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In The

Supreme Court of the United States

October Term, 1982

ODRIC BAKER, PETER G. LARSON, GORDON C. THAYER, FRANK THAYER, RICK ST. GERMAINE, BRUCE TAYLOR, and JAMES H. SCHLENDER, individually and as members of the Lac Courte Oreilles Tribal Governing Board,

Petitioners,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the Lac Courte Oreilles Chippewa Tribe deprived of its legitimate, bargained-for expectation under the Treaty of 1854, 10 Stat. 1109, to the exclusive, or at least protected, use of the navigable waters within their reservation for hunting, fishing and gathering wild rice, and the concomitant power to control non-member use thereof?

2. Did the Court below deprive the Tribe of a full and fair hearing by refusing to allow evidence of the right to regulate non-Indian use of the navigable waters pursuant to *Montana v. United States,* 450 U.S. 544 (1981), where that case was decided after the hearing on the merits?

3. Did the Court of Appeals err in vacating the District Court determination that the Lac Courte Oreilles Reservation boundaries include the navigable lakes or parts thereof, within the townships reserved to the Tribe?

LIST OF PARTIES

Present parties are listed in the caption. Former parties prior to a change in the composition of the Lac Courte Oreilles Tribal Governing Board:

Margaret Diamond

Charles Diamond

Theresa Williams

Eugene Begay

TABLE OF AUTHORITIES

	Pages
Opinions Below	1
Jurisdiction	2
Treaties Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
1. The Court Below, In Direct Conflict With Applicable Decisions Of This Court, Expanded The Scope Of The Strong Presumption Against Federal Transfer Of Title To The Bed Of Navigable Waters, To Include A Presumption Against A Grant Of Other Rights Associated With The Use Of Navigable Waters Which Would Result In Any Derogation Of State Sovereignty.	5
2. Assuming Arguendo, That There Is A Presumption Favoring State Sovereignty, The Decision Below Presents The Important, Unresolved Federal Question Of Whether The Presumption Is Overcome By Facts Showing The Indians' Clear Understanding Of Their Treaty Rights, Where That Understanding Was Reasonable And Compelled By The Circumstances Surrounding Negotiation And Signing Of The Treaty.	11
a. The Court Erred In Not Considering The Tribe's Understanding As Shown By Circumstances Surrounding The Treaty.	12

TABLE OF AUTHORITIES—Continued

Pages

b. The Same Result Should Be Reached Here As In *Alaska Pacific Fisheries v. United States.* 17

3. The Tribe Was Deprived Of A Full And Fair Opportunity To Present Evidence Supporting Its Regulatory Authority Over Hunting, Fishing, And Ricing On Navigable Waters Within Its Reservation Boundaries. 19

Conclusion 22

Appendices:

Appendix A Court of Appeals' Opinion ..... App. 1

Appendix B Preliminary Injunction Order ..... App. 31

Appendix C Preliminary Injunction Opinion ..... App. 34

Appendix D District Court Opinion of 1978 ..... App. 45

Appendix E District Court Opinion on the Merits ..... App. 69

Appendix F Treaty of 1854 ..... App. 92

CASES

Alaska Pacific Fisheries v. United States, 248 U. S. 78 (1918) 10, 13, 16, 17, 18, 19

Arizona v. California, 373 U. S. 546 (1963) 7, 9, 10, 14

Cappaert v. United States, 426 U. S. 128 (1976) 7

Choctaw Nation v. Oklahoma, 397 U. S. 620 (1970) 13, 16, 18

TABLE OF AUTHORITIES—Continued

Pages

Colville Confederated Tribes v. Walton, 647 F. 2d 42 (9th Cir. 1981), cert. denied, 454 U. S. 1092 21

Jones v. Meehan, 175 U. S. 1 (1899) 15

Knight v. Shoshone and Arapaho Indian Tribes, 670 F. 2d 900 (10th Cir. 1982) 21

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F. 2d 341 (7th Cir. 1983) 10, 13

Lone Wolf v. Hitchcock, 187 U. S. 553 (1903) 13

Menominee Tribe v. United States, 391 U. S. 404 (1968) 16

Minnesota v. Block, 660 F. 2d 1240 (8th Cir. 1981), cert. denied, 455 U. S. 1007 (1982) 8

Montana v. United States, 450 U. S. 544 (1981) 4, 5, 6, 7, 12, 13, 14, 18, 19, 20, 21

Pollard's Lessee v. Hagan, 44 U. S. 3 (How.) 212 (1845) 6, 8

Shively v. Bowlby, 152 U. S. 1 (1894) 8

Soric v. Immigration and Naturalization Service, 382 U. S. 285 (1965) 20

United States v. Bouchard, 464 F. Supp. 1316 (W. D. Wis. 1978) 4, 9

United States v. Brown, 552 U. S. 817 (8th Cir. 1977), cert. denied, 431 U. S. 949 8

TABLE OF AUTHORITIES—Continued

Pages

United States v. Hells Canyon Guide Service, Inc., 660 F. 2d 735 (9th Cir. 1981) 3

United States v. Holt State Bank, 270 U. S. 49 (1926) 5, 6, 7, 9, 10, 19

United States v. Lindsey, 595 F. 2d 5 (9th Cir. 1979) 8

United States v. Mazurie, 419 U. S. 544 (1975) 6

United States v. Thomas, 151 U. S. 577 (1894) 10

Washington v. Fishing Vessel Ass'n., 443 U. S. 658 (1979) 8, 15, 16, 18, 21

James A. Watts v. Seward School Board, 381 U. S. 126 (1965) 20

Winters v. United States, 207 U. S. 564 (1908) 7, 9, 10, 14

Worcester v. Georgia, 31 U. S. (6 Pet.) 515 (1832) 11

STATUTES

25 U. S. C. § 476 2

28 U. S. C. § 1254 (1) 2

28 U. S. C. § 1331 (a) 3

28 U. S. C. § 1441 (b), 1446 3

MISCELLANEOUS

Art. IV, § 3, Constitution 8

F. Cohen, Handbook on Federal Indian Law (U. N. Mex. Press reprint in 1971) 10

TABLE OF AUTHORITIES—Continued

Pages

Op. Sol. Interior, June 30, 1936 (No. M-28107) 10

Treaty of Sept. 30, 1854, 10 Stat. 1109 ..... 2, 3, 4, 19

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Petitioners,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Baker, et al., respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 698 F. 2d 1323 (7th Cir. 1983) and is reproduced as Appendix A, App. 1. The federal District

Court for the Western District of Wisconsin granted a preliminary injunction (App. B, App. 31) and issued an unpublished opinion in support of its grant of a preliminary injunction (App. C, App. 34). The District Court issued a published opinion dealing with defendants' motion to dismiss. 464 F. Supp. 1377 (W. D. Wis. 1978) (App. D, App. 45). The opinion of the District Court on the merits is reported at 524 F. Supp. 726 (W. D. Wis. 1981) and is reproduced as Appendix E, App. 69.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 26, 1983. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

TREATIES INVOLVED

Treaty of September 30, 1854, 10 Stat. 1109. Because of the length of the treaty, it is set out in Appendix F, App. 92.

STATEMENT OF THE CASE

The Lac Courte Oreilles Band of Chippewa Indians (hereafter Tribe or Band) adopted an Indian Reorganization Act Constitution in 1966, 25 U. S. C. § 476. In 1976, they decided to regulate hunting, fishing, trapping and ricing on the reservation and enacted their Conservation

Code. The Conservation Code provides for licensing and setting seasons and bag limits for fishing, hunting and harvesting wild rice. The Code was effective on May 24, 1976. On May 27, 1976, Wisconsin filed a civil action against the members of the Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians seeking declaratory and injunctive relief to prohibit enforcement of the Code against non-Indians within the Lac Courte Oreilles Indian Reservation. The complaint was filed in the State Circuit Court for Sawyer County, Wisconsin. The case was removed to federal district court on defendants' petition, unopposed by the State. 28 U. S. C. §§ 1441 (b), 1446. Jurisdiction in the federal court was based on 28 U. S. C. § 1331(a) (general federal question jurisdiction).

On the State's motion, the district court entered a preliminary injunction on July 9, 1976. App. B, App. 31. The court enjoined defendants from enforcing the tribal code at issue against non-members on lakes partly within and partly without the reservation's boundaries. It allowed enforcement on lakes wholly within the reservation's boundaries but required the escrow of license fees collected from non-members. The Court issued an unreported memorandum opinion in support of its injunction. App. C, App. 34.

The federal district court scheduled a trial for December 14-15, 1978, to determine "whether the parties to the 1854 treaty intended that the Band be granted the right to the exclusive use of the lakes in question." 464 F. Supp. at 1387, App. D, App. 66. The questions at trial, as limited by the court, were the intent of the parties to the Treaty of September 30, 1854, between the Chippewas of

Lake Superior and the United States, 10 Stat. 1109, and the boundaries of the Lac Courte Oreilles Indian Reservation set aside pursuant to article 2 of the treaty.

The district court issued its final decision on October 23, 1981. 534 F. Supp. 725, Appendix E, App. 69. The court held that the reservation's boundaries include the navigable lakes, or parts thereof, within the townships reserved to the Tribe and that the Lac Courte Oreilles people understood during the treaty negotiations and signing that they would have exclusive use of these lakes for harvesting animals and plants. The court found that this understanding was "a reflection of actually existing exigent circumstances and pressing need on behalf of the Chippewas for exclusive control of the resources to be drawn from both the land and the water within the reservation in the long years ahead." *Id.*, App. 84, 87-88. But the court concluded that these facts were legally insufficient to reserve exclusive harvesting rights to the Indians in light of the decision in *Montana v. United States,* 450 U. S. 544 (1981). The court, therefore, entered judgment enjoining petitioners from enforcing the tribal codes at issue against all non-members.[1]

The petitioners appealed the court's decision that the Lac Courte Oreilles Tribe did not have exclusive or at least protected harvesting rights on the navigable waters within the boundaries of the Lac Courte Oreilles Reservation. On appeal, the Seventh Circuit affirmed the district court's determination that the 1854 treaty did not grant

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[1]The district court also made certain findings in the case of United States v. Bouchard, 464 F. Supp. 1316 (W. D. Wis. 1978), which findings were adopted in this case.

the Lac Courte Oreilles Tribe the exclusive right to fish, hunt and rice on the navigable waters and that the Tribe, therefore, did not have exclusive jurisdiction to regulate these activities by non-Indians on the reservation. It further held that it was not necessary to determine whether the reservation's boundaries include any navigable waters, and vacated the district court's findings in this regard.

After *Montana v. United States, supra,* the Tribe requested the opportunity to present evidence bearing on the question whether fishing, hunting and ricing by non-Indians within the Lac Courte Oreilles Reservation threatens and has an adverse effect on the political integrity, economic security, health, and welfare of the Lac Courte Oreilles Tribe thereby giving rise to regulatory rights in the Tribe. The Tribe noted that the issues at the earlier hearings were defined by the district court in such a manner as to exclude such evidence. The district court refused to allow this, and the Court of Appeals affirmed.

REASON FOR GRANTING THE WRIT

1. The Court Below, In Direct Conflict With Applicable Decisions Of This Court, Expanded The Scope Of The Strong Presumption Against Federal Transfer Of Title To The Bed Of Navigable Waters, To Include A Presumption Against A Grant Of Other Rights Associated With The Use Of Navigable Waters Which Would Result In Any Derogation Of State Sovereignty.

Montana v. United States, 450 U.S. 544 (1981) and *United States v. Holt State Bank,* 270 U.S. 49 (1926)

stand for the proposition that "A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States. . . . " *Montana, supra,* at 552. This presumption traces back to the equal footing doctrine, providing that since the original States held title to the beds of navigable waters within their boundaries, so too must States admitted thereafter. *Pollard's Lessee v. Hagan,* 44 U. S. 3 (How.) 212, 222-223 (1845); *Montana, supra* at 551. Despite the fact that title to the beds of the navigable waters was not at issue below, the Court of Appeals applied the presumption of *Montana* and *Holt State Bank,* to questions associated with use, as is clear from the following selected statements of the court:

"There are weighty reasons for presuming that the 1854 treaty did not confer upon the Band exclusive hunting and fishing rights in navigable Wisconsin lakes." 698 F. 2d at 1333, App. A, App. 21, citing *Montana.* One of the reasons given was that powers should not be granted to private, non-representative groups. 698 F. 2d at 1334, App. A, App. 22. This view of Indian tribes is contrary to that in *United States v. Mazurie,* 419 U. S. 544, 557 (1975) and many other cases.

And further,

". . . we must therefore presume—absent evidence of a contrary intention 'definitely declared or otherwise made plain,' or of a 'public exigency' sufficient to war-

> rant an inference of such an intention—that the United States did not exercise that power in 1854 when it signed a treaty with the Chippewa Indians. *Montana, supra,* at 552, quoting *United States v. Holt State Bank,* 270 U. S. 49, 55."

698 F. 2d at 1135, App. A, App. 24.

And finally,

> Thus when, as in the case before us, interpreting a treaty as the Indians understood it would have the effect of divesting a state of some of its sovereign power over non-Indians, we will not adopt a rule that requires us to interpret the treaty as the Indians understood it. Montana, 450 U. S. at 552-553; id. at 567-568 (Stevens, J. concurring).

Id. at 1334, App. A, App. 23 at n. 12.

The Court of Appeals did not acknowledge that it was extending the holding of *Montana, supra,* far beyond its previously limited scope. In making this extension the Court of Appeals runs afoul of this Court's decisions which hold that the *Montana* presumption has no place where questions of title to the bed of navigable waters are not involved. The precise distinction between cases involving title to the bed of navigable waters and those not involving title was recognized as crucial in *Arizona v. California,* 373 U. S. 546 (1963). *See also, Winters v. United States,* 207 U. S. 564 (1908); *Cappaert v. United States,* 426 U. S. 128 (1976). *Arizona v. California* was a case involving post-statehood reservations and the rights granted to the Indian occupants when the reservations

were created. The identical situation exists here. This Court stated the rule dispositive in this case:[2]

> Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rest largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212, [11 L. Ed. 565] (1845) and *Shively v. Bowlby*, 152 U. S. 1, [14 S. Ct. 548, 38 L. Ed. 331] (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

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[2]Federal authority over navigable waters within a post-statehood national forest wilderness area was sustained in Minnesota v. Block, 660 F. 2d 1240 (8th Cir. 1981), cert. denied, 455 U. S. 1007 (1982), and in United States v. Brown, 552 U. S. 817 (8th Cir. 1977), cert. denied, 431 U. S. 949. In United States v. Lindsey, 595 F. 2d 5 (9th Cir. 1979), the court sustained federal authority over activities on the state-owned banks of a navigable river within a national recreation area. The same court sustained a federal requirement for a permit to operate a guide service on a navigable river within a national recreation area in United States v. Hells Canyon Guide Service, Inc., 660 F. 2d 735, (9th Cir. 1981). And in Washington v. Fishing Vessel Ass'n., 443 U. S. 658, 689-92 (1979), this Court upheld a 1930 treaty with Canada that limited the authority of the State of Washington over fishing in the Fraser River.

If the presumption against transfer of title of the beds of navigable waters does not apply to questions of ownership of the water itself much less does it apply to a case involving the limited, exclusive or protected use at issue here.

Accordingly, in *United States v. Bouchard*, 464 F. Supp. 1316 (W. D. Wis. 1978) the Court noted:

> Thus a holding in this case that the federal government had the authority to grant *exclusive* use of the Kagagon Slough to the Indians, but did not have the authority to divest the state of its *title* to that waterway without compensation, is consistent with the *Arizona decision.* (emphasis added).

Id. at 1342 and n. 15.

Indeed, the rule applicable where the issue involves rights other than bed ownership is set out in *Winters v. United States, supra,* thus:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occuring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.

Id. at 576-77.[3]

After this Court's decision in *United States v. Holt State Bank*, 270 U. S. 49 (1926), the Acting Solicitor ruled that the Red Lake Chippewa, for whom the United States

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[3]In the same opinion, this Court rejected the argument that the equal footing doctrine somehow did away with federal reserved water rights when Montana entered the Union.

brought *Holt State Bank*, have exclusive fishing rights in the navigable lakes of their unceded reservation notwithstanding state ownership of the lake beds. Op. Sol. Interior, June 30, 1936 (No. M-28107), *reprinted in* I Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 at 652 (GPO 1978), and quoted in part in F. Cohen, *Handbook of Federal Indian Law* 285-86 (GPO 1942; U. N. Mex. Press reprint in 1971). The Red Lake Band exercises this exclusive right today. The Acting Solicitor noted that " . . . the right of fishing in the waters of Upper and Lower Red Lakes may exist in the Indians notwithstanding State ownership of the submerged lands."[4]

The Seventh Circuit's opinion in this case fails to distinguish between questions of sovereignty and questions of title. Had the Court below not engaged in its unwarranted presumption, the normal rules of construction of Indian treaties would have been more than sufficient to carry the day for the Tribe. *See, e.g., Winters v. United States, supra; Arizona v. California, supra; Alaska Pacific Fisheries v. United States*, 248 U. S. 78 (1918). *See also* discussion *infra*.

The Seventh Circuit found inapplicable the rule of treaty interpretation found controlling in *Voigt, supra*, on

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[4]The situation presented to the Acting Solicitor was one in which the Indians may have had an interest at the time of admission of the State. But the relevant point here is that state ownership of the bed of navigable waters and the exclusive tribal right to fish in the waters are not inconsistent. At any rate the waters here were, at a minimum burdened with the Tribe's rights under a previous treaty. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F. 2d 341 (7th Cir. 1983). See also, *United States v. Thomas*, 151 U. S. 577 (1894).

the ground that "there are other concerns besides facilitating communication between the United States and the Indians that may come into play when a court is asked to resolve a dispute regarding the interpretation of an Indian treaty. Preserving the power of state governments to promote public welfare is one such concern . . ." 698 F. 2d at 1334 and n. 12, App. A, App. 23. The latter interest was found by the Court to be weightier. No rationale was given for allowing one presumption to outweigh the other, and in light of both our federal system of government and the federal government's trust responsibility toward Indian peoples, the Seventh Circuit's resolution of the matter was impermissible.

Apparently the Seventh Circuit did not realize that virtually all Indian treaties affect state sovereignty, including that of the original states. *See, e. g., Worcester v. Georgia,* 31 U. S. (6 Pet.) 515, 561 (1832). The opinion, as it now stands, revolutionizes the field of Indian treaty law in a manner in direct conflict with this Court's opinions. It destroys the legitimate treaty rights involved here and threatens many others. For these reasons, the court should grant certiorari in this case.

2. Assuming Arguendo, That There Is A Presumption Favoring State Sovereignty, The Decision Below Presents The Important, Unresolved Federal Question Of Whether The Presumption Is Overcome By Facts Showing The Indians' Clear Understanding Of Their Treaty Rights, Where That Understanding Was Reasonable, And Compelled By The Circumstances Surrounding Negotiation And Signing Of The Treaty.

a. The Court Erred In Not Considering The Tribe's Understanding As Shown By Circumstances Surrounding The Treaty.

The Court of Appeals refused to consider whether the assumed presumption favoring state sovereignty was overcome by facts (undisturbed on appeal) as found by the district court, showing clearly that the Indians understood that they would have exclusive rights to hunting, fishing and ricing within the reservation boundaries.

The district court found:

> 88. When the 1854 treaty was being negotiated and when it was entered into, the Chippewa in general and the LCO band in particular understood that all of the waters, meandered and unmeandered, navigable and unnavigable, which would lie within the outer boundary of the reservation, as defined in finding 86, above, would be waters the use of which it would be within the sovereign power of the Chippewa to control and regulate as to both members and nonmembers of the tribe.
>
> 89. The understanding on the part of the Chippewa in general and the LCO band in particular described in findings 86 and 88, above, was a reflection of actually existing exigent circumstances and pressing need on the part of the Chippewa for exclusive control of the resources to be drawn from both the land and the water within the reservation in the long years ahead, as, foreseeably, the lands and waters beyond the boundaries of the reservation were to be exploited in the course of the non-Indian migration to the northern middle west.

524 F. Supp. at 733, 734, App. C, App. 84, 87-88.

The Seventh Circuit felt that *Montana v. United States, supra,* was dispositive in precluding any deference

to the Indians' understanding of the treaty. In *Voigt, supra, Montana* was noted as a case in which this Court deviated from the rule of construction that Indian treaties must be construed as the Indians understood them. 700 F. 2d at 350 and n. 5. But *Montana* never held that the Indians' understanding could be ignored. It merely held, in the context of a question over title to the bed of a navigable river, that absent a clear showing to the contrary, the presumption that title passes to a state prevails even where Indian claims are involved. Thus, intent to make a transfer must be "definitely declared or *otherwise* made very plain." *Id.* at 554. (Emphasis added). It can be otherwise made plain by circumstances and the understanding of the Indians. *Choctaw Nation v. Oklahoma,* 397 U. S. 620 (1970); *Alaska Pacific Fisheries v. United States,* 248 U. S. 78 (1918).

This Court, in *Montana* itself, analyzed the circumstances surrounding the Crow treaty and concluded that "at the time of the treaties" [the situation] "presented no 'public exigency' which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States." *Id.* at 556. And further, "As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Id.* Even after the reservation was formed, little had been done to improve the fishery. *Id.* at 548. Those circumstances contributed to this Court's conclusion that the Crows did not have the rights sought. *Id.* at 556-57. The Crow Indians simply had no legitimate expectation of exclusive fishing rights on the Big Horn River and thus the decision in *Montana* did not

deprive them of the basis of their bargain as does the decision below. But the *Montana* opinion does show that this Court did take the Indians' understanding into consideration, as an important element in ascertaining the scope of the rights granted by the treaty.

This Court thus has consistently recognized that circumstances surrounding the treaty and the understanding of the Indians can be analyzed to find if the appropriate intent of the United States to convey rights is "otherwise made plain." See e. g., *Arizona v. California, supra,* and *Winters v. United States, supra.* The Seventh Circuit did not comprehend this, stating flatly:

> "Thus, regardless of whether the Chippewa believed in 1854 that their treaty with the United States conferred upon them the power to prohibit public fishing and hunting in navigable lakes, unless it plainly appears that the United States intended to divest Wisconsin of some of its sovereignty over non-Indians we will not interpret the treaty as conferring that power upon the Chippewas."

698 F. 2d at 1334, App. A, App. 22.

The Court of Appeals maintains that there is nothing to show that the United States was charged with knowledge of how the Indians understood the treaty and therefore it cannot be said what the federal intent was. We can presume that if the Indians were in exigent circumstances, the federal government knew that—and the record clearly shows knowledge of the general dependence of the Indians on the waters (524 F. Supp. at 730, 731, 733, 734, App. E, App. 76-81, 84, 87-88). Furthermore, the opinion below overlooks the fact that the Indians' understanding and circumstances are precisely a means of getting at

the federal intent, as this Court made clear in *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658, 675, 676 (1979):

> A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. E. g., Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. Ed. 299, 23 S. Ct. 216. When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length. There is no reason to doubt that this assumption applies to the treaty at issue here. See 520 F. 2d, at 684.
>
> Accordingly, *it is the intention of the parties*, and not solely that of the superior side, *that must control* any attempt to interpret the treaties. *When Indians are involved, this Court has long given special meaning to this rule.* It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. [T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense which they would naturally be understood by the Indians." Jones v. Meehan, 175 U. S. 1, 11, 44 L. Ed. 49, 20 S. Ct. 1. This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor. (emphasis added).

Circumstances are so potent they may give meaning to the treaty even when the particular point at issue was not contemplated. *Washington v. Fishing Vessel Ass'n, supra*:

> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought

> inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

Id. at 669. *See also, Choctaw Nation v. Oklahoma,* 397 U. S. 620, 633, 634 (1970). This totally undercuts the Court of Appeals' assertion that somehow to ascertain the intent of the federal government, evidence must show that its negotiators had the prescience to see how much pressure would be put on the navigable waters within the reservation boundaries. 698 F. 2d at 1335, App. A, App. 25. The rule has always been that the government intends to conform its actions to the Indians' needs. *Alaska Pacific Fisheries, supra,* 248 U. S. at 89.

The Court of Appeals has formulated the rule that the presumption against divestment of state sovereignty can never be overcome without explicit language. That holding is directly contrary to this Court's decisions in *Washington v. Fishing Vessel Ass'n., supra; Choctaw Nation v. Oklahoma, supra;* and *Alaska Pacific Fisheries v. United States, supra,* all of which allowed circumstances to control. It is also directly contrary to *Menominee Tribe v. United States,* 391 U. S. 404 (1968) at n. 12 where this Court noted that any jurisdiction the state of Wisconsin acquired over reservation lands at statehood in 1848 would not have survived the Menominee Treaty of 1854. This Court should grant certiorari to decide the important federal question of whether the clear and reasonable understanding of an Indian tribe can overcome an assumed presumption against derogation of state sovereignty.

b. The Same Result Should Be Reached Here As In Alaska Pacific Fisheries v. United States.

This Court's precedent most closely resembling this case is *Alaska Pacific Fisheries v. United States, supra.* This Court construed an 1891 statute that set aside "the body of lands known as Annette Islands" in Alaska for a group of Indians who had recently migrated from Canada. 248 U S. at 86-87. This Court held that the statute implicitly reserved to the Indians the exclusive use of the adjoining ocean fishery, examining the circumstances in which the reservation was created, the location and character of the islands, and the situation and needs of the Indians. *Id.* at 87. The Court noted that the upland was timbered and some of it was arable, but the principal resource was the adjacent fishery. *Id.* at 88. The Indians were "largely fishermen and hunters, accustomed to living from the returns of those vocations." *Id.* Before the reservation was made, the Indians had begun using the fishery. *Id.* at 88-89. "The Indians could not sustain themselves from the use of the uplands alone. The use of the adjacent fishing grounds was equally essential. . . . The Indians naturally looked on the fishing grounds as part of the islands. . . . Evidently, Congress intended to conform its actions to their situation and needs." *Id.* at 89. From these facts alone, the Court construed the reservation to include the adjacent fishery.

In many ways, the inference of an intent to reserve the fishery in *Alaska Pacific* was more difficult than in this case. That was a statutory reservation unilaterally reserved for Indians not native to the area but who had recently migrated from Canada, and the waters involved

were not small lakes but part of the Pacific Ocean. The United States received no cession of valuable lands in exchange. In the instant case, the Chippewa reservations were set aside by treaty. The United States received extremely valuable consideration, and settled rules of construction make the Indians' intent and understanding a significant factor in construing the treaty. Also, the inference derived from existing uses of the Indians is stronger and more natural, because the reservations are of the Chippewas' native territory, where they had hunted, fished and gathered for many years before the treaty. *See also, Washington v. Fishing Vessel Ass'n., supra.*

In contrast, the Court in *Montana* held that an 1868 treaty setting aside the Crow Reservation in Montana had not conferred on the Crows, ownership of the beds and banks of the Big Horn River, which traverses the reservation. But the Court did not reject the reasoning of *Alaska Pacific Fisheries;* the case was twice cited as good law, but distinguished. 450 U. S. at 556.[5] There was no basis to infer a reservation to the Crows of existing uses of the river. For this reason, their case rested entirely on their claim of ownership of the river's beds and banks. The Court rejected that claim based on the competing public policy of state ownership. But in so doing, the Court did not strip the Crows of the major consideration for their agreement to the treaty. Their previous means of livelihood was not removed. Indeed, the record showed

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[5]The Court also distinguished its prior decision in Choctaw v. Oklahoma, 397 U. S. 620 (1970), sustaining tribal ownership of the beds and banks of the Arkansas River in Oklahoma. 450 U S. at 555 n. 5.

that the Big Horn River had not been a useful fishery at all until the federal government built a dam that "made trout fishing in the Big Horn River possible." 450 U. S. at 548. Plainly, the Crows were claiming a resource they had no reason to expect was theirs at treaty time.

The *Montana* court also relied on the decision in *United States v. Holt State Bank*, 270 U. S. 49 (1926). In that case, the United States claimed ownership on behalf of Chippewa Indians in Minnesota of the dry bed of a former lake. The lake had been within a former reservation that the Chippewas had ceded in 1889. 270 U. S. at 51-52. It was then drained, platted, and sold. The claim for the Indians again rested solely on absolute title to the beds and banks of the lake. No fishery was involved. The Indians were not deprived of their expected rights in a retained reservation. Had the dispute arisen over a fishery within an existing reservation, the case would have been quite different.

Alaska Pacific Fisheries and the instant case are another matter altogether. In both cases, the Indians' claim is to uses they were making at the time the reservations were set aside. In both cases the uses were central to their support and way of life. In the Treaty of 1854, these uses were the principal consideration to the Indians for a cession of vast mineral wealth to the government. *Alaska Pacific Fisheries* is therefore the controlling precedent, and the Court should grant certiorari to correct the error below.

3. The Tribe Was Deprived Of A Full And Fair Opportunity To Present Evidence Supporting Its Regulatory Authority Over Hunting, Fishing, And

Ricing On Navigable Waters Within Its Reservation Boundaries.

The hearing on the merits was held in the district court on December 14 and 15, 1978. The court did not render its decision until 1981. In the interim, this Court had decided *Montana v. United States, supra,* which indicates that Indian tribes can regulate non-Indian activity on fee land *within a Reservation* if important tribal interests are implicated. Despite this new legal development, the district court refused to allow additional evidence. The Court of Appeals relied on the absence of such evidence to support its determination that no such rights existed, stating:

> The Chippewas may have feared in 1854 that public fishing and hunting in navigable lakes within their reservation would one day threaten their fisheries—although that day has apparently not yet come, since defendants do not contend that public fishing and hunting pose an imminent threat to the "political integrity, the economic security, or the health or welfare" of the Band. *Montana, supra,* 450 U. S. at 566, 101 S. Ct. at 1258.

698 F. 2d at 1335, App. A, App. 25. The District Court denied the Tribe's request for an opportunity to present evidence going to these precise issues. The Tribe's rights have been determined without an opportunity to present evidence.

Cases should be decided on the law as it exists at the time of the appeal. *Soric v. Immigration and Naturalization Service,* 382 U. S. 285 (1965); *James A. Watts v. Seward School Board,* 381 U. S. 126 (1965). Therefore, the case should be remanded with instructions to receive

evidence pursuant to *Montana*.[6] This right to present evidence should extend to modern circumstances as recognized by *Washington v. Fishing Vessel Ass'n.* (modern circumstances may dictate that Indians are entitled to a specific quantum of fish even where no specific quantum had been specified in the treaty).

Since regulatory action under *Montana* depends on whether effects are within Reservation boundaries or not, the Court of Appeals' determination that the boundary issue is irrelevant should likewise be vacated. The Seventh Circuit correctly notes that the district court "expressly found that the outer boundary of the Band's Reservation encompass navigable lakes" 698 F. 2d at 1335, 1336, App. A, App. 26. In response to the cross-appeal by the State of Wisconsin contending that this finding was erroneous, the Seventh Circuit vacated the finding because of its view that the Tribe lacks jurisdiction to restrict non-Indian fishing, hunting, and ricing, on the waters whether they are within or without the Reservation boundary. This holding by the Seventh Circuit ignores the obvious fact that intent to include waters in the Reservation is itself a persuasive factor indicative of the intended usage of these waters by the Tribe.

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[6]On remand, the analysis would follow that in cases such as *Knight v. Shoshone and Arapaho Indian Tribes*, 670 F. 2d 900 (10th Cir. 1982) and *Colville Confederated Tribes v. Walton*, 647 F. 2d 42 (9th Cir. 1981), cert. denied, 454 U. S. 1092, both of which upheld tribal regulatory authority over non-Indian on non-tribal land within the reservation.

CONCLUSION

The Court should grant the petition so that it may review the important questions concerning treaty rights in the context of a post-statehood reservation.

Respectfully submitted,

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APPENDIX A

STATE OF WISCONSIN,

Plaintiff-Appellee,
Cross-Appellant.

vs.

Odric BAKER, et al.,

Defendants-Appellants,
Cross-Appellees.

Nos. 81-2868, 81-2916

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 14, 1982.

Decided Jan. 26, 1983.

Before CUMMINGS, Chief Judge, Pell, Circuit Judge, and WEICK, Senior Circuit Judge.*

CUMMINGS, Chief Judge.

This case involves a jurisdictional dispute between the state of Wisconsin ("the State") and a band of American Indians. Each claims exclusive jurisdiction to regulate fishing and hunting by the general public in certain navigable lakes in Wisconsin. After a bench trial on the merits, the district court upheld the State's claim and granted declaratory and injunctive relief against defendant officials of the band. Defendants appeal from that final judgment; the State cross-appeals from four findings in the

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*The Honorable Paul C. Weick, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

district court's opinion reported in 524 F. Supp. 726. For the reasons that follow, we affirm.

In 1848 Wisconsin became a state. Six years later the United States signed a treaty with the Chippewa Indians of Lake Superior and the Mississippi River. The terms of that treaty provided for the cession by the Chippewas of some seven million acres of land in northeast Minnesota in exchange for a promise by the United States "to set apart and withhold from sale, for the use of the Chippewas" certain tracts of land in Wisconsin and Michigan estimated as totalling roughly four hundred and eighty thousand acres. *United States v. Bouchard,* 464 F. Supp. 1316, 1331-1332 (W. D. Wis. 1978). One of these tracts "equal in extent to three townships" (69,120 acres) was to be situated near a lake in northern Wisconsin known as "Lac Courte Oreilles." The band of Chippewas that settled on this tract is, appropriately enough, known as the Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("the Band"). Defendants-appellants are officials of the Band.

The 1854 treaty did not fix the precise boundaries of the Band's reservation. Instead, the treaty provided that "the boundaries of [the Band's reservation] shall be hereafter agreed upon or fixed under the direction of the President [of the United States]." It was not until 1873 that a list of the parcels of land comprising the reservation was finally agreed upon and not until 1876 that the outer boundaries of the reservation were surveyed and fixed. Of the 69,120 acres of land in the 1873 list, the Band presently owns some 24%; individual members of the Band 39%; and non-members of the Band 37%.

Pursuant to the Indian Reorganization Act of 1934, 25 U. S. C. § 461, 48 Stat. 984, the Band has enacted its own constitution. The constitution establishes a governing board ("the Governing Board") whose members are elected by the Band. Article 7 of the constitution empowers the Governing Board "to regulate, by enactment of ordinances, the activities of hunting, fishing, ricing, trapping, or boating by members and non-members of [on] all lands and waters" within the Band's reservation.

In 1976, the Governing Board enacted a "Fishing, Hunting, Trapping, and Ricing Code" ("the Code"). Sections of the Code purport to restrict fishing and hunting in all waters within the Band's reservation. Violators are subject to fines of up to $500 and incarceration in the Band's jails for up to six months.[1] Three days after the Code's effective date, the State filed suit in a Wisconsin circuit court against members of the Governing Board. The State sought a declaratory judgment that defendants' enforcement of the Code against non-members of the Band infringed upon the general public's right to fish, hunt, and recreate in navigable state waters.

Defendants removed the suit to federal district court under 28 U. S. C. § 1441 and the State moved for a preliminary injunction enjoining defendants from prohibiting non-members of the Band from fishing in certain navigable

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[1]In 1978, two months after the Supreme Court held in *Oliphant v. Suquamish Tribe*, 435 U. S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209, that unless specifically authorized to do so by Congress, Indian tribes may not exercise criminal jurisdiction over non-Indians, the Governing Board amended the Code so that non-members of the Band who violate the Code's fishing and hunting restrictions are subject only to civil, not criminal, process in the Band's courts.

lakes without a licese issued by the Band. The district court granted the State's motion on July 9, 1976 (App. 11a-12a), and some five years later, after a two-day bench trial, entered a final order awarding the State declaratory and permanent injunctive relief. The district court's final order declared that the State enjoys "exclusive jurisdiction to regulate hunting and fishing activities by non-members of [the Band] on and in the navigable waters lying within the outer boundaries of the [Band's] reservation" and that "[d]efendants enjoy no jurisdiction to regulate hunting and fishing activities by such non-members on and in such navigable waters" and permanently enjoined "defendants, their successors in office, their agents and employees from enforcing or attempting to enforce against any non-members of the [Band] on any navigable water[s] lying within the outer boundaries of the [Band's] reservation" the Code's fishing regulations. 524 F. Supp. at 735-736. This appeal and cross-appeal followed.

I. *Federal Question Jurisdiction*

Section 1441(a) of Title 28 of the U. S. Code permits removal to a federal district court of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Because there is no diversity of citizenship between the State and defendants—a state is not a citizen of a state for purposes of diversity jurisdiction, *Moor v. County of Alameda*, 411 U. S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596—removal of this action to the court below was proper only if the State's cause of action "arises under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331(a). Neither party raised this issue before us, but after hearing oral argument we ordered the filing of supplemental briefs addressing the

jurisdictional question.[2] After examining those briefs and the relevant case law, we are convinced that the district court had original subject matter jurisdiction over this suit.

In its complaint, the State asserts as trustee for its public two distinct property interests: (1) title to the beds underlying navigable Wisconsin lakes and (2) the right to enjoy free access to the waters of those lakes "for purposes of navigation, fishing, hunting, swimming, commerce, enjoyment of scenic beauty, and general recreation." Both interests are descendant from federal law. Prior to Wisconsin's admission into statehood, the United States held these same interests in trust for the public pursuant to a 1783 deed of cession by four of the original 13 states and the Northwest Ordinance of 1787. See 1783 Virginia Act of Cession; Northwest Ordinance, Act of July 13, 1787, art. IV, 1 Stat. 51; *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212, 11 L. Ed. 565. These interests passed to Wisconsin upon admission into the Union pursuant to the Wisconsin Enabling Act of 1846, 9 Stat. 56, and the Act of March 3, 1847, 9 Stat. 178. The State argues—and the district court implicitly held—that because the lineage of its existing property interests in navigable lakes originates in federal law, the State's claim that defendants are infringing those interests "arises under" federal law.

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[2]We note that newly revised Circuit Rule 9(b), effective January 10, 1983, requires that appellants include in their main briefs a jurisdictional summary "which will appear before the statement of the case and shall include an explanation of the statutory basis for the jurisdiction of the district court (if applicable) and of this court, as well as other information relevant to jurisdiction . . .".

We disagree. That a right of property was at one time governed by federal law or first conveyed by the United States does not render a suit to enforce that right one "arising under" federal law. *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 676-677, 94 S. Ct. 772, 781-82, 39 L. Ed. 2d 73; *Shulthis v. McDougal,* 225 U. S. 561, 569-570, 32 S. Ct. 704, 706, 56 L. Ed. 1205; *Joy v. City of Saint Louis,* 201 U. S. 332, 341, 26 S. Ct. 478, 480, 50 L. Ed. 776; *Shoshone Mining Co. v. Rutter,* 177 U. S. 505, 507-508, 20 S. Ct. 726, 727, 44 L. Ed. 864. Only if federal law continues to govern the right, see *Oneida Indian Nation,* 414 U. S. at 676-677, 94 S. Ct. at 781-82, *Joy,* 201 U. S. at 342-343, 26 S. Ct. at 481, or if the suit is to decide whether the United States did, in fact, originally convey it, see *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U. S. 10, 22, 56 S. Ct. 23, 29, 80 L. Ed. 9; *Smith v. Kansas City Title and Trust Co.,* 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577; does an action to enforce that right "arise under" federal law. "The federal nature of the right to be established is decisive—not the source of the authority to establish it." *Puerto Rico v. Russell & Co.,* 288 U. S. 476, 483, 53 S. Ct. 447, 449, 77 L. Ed. 903. Were it otherwise, anyone claiming title to real estate in the western United States could bring suit in federal court since title to all lands in those parts of the nation is traceable to a federal grant or law. *Shoshone Mining Co. v. Rutter, supra,* 177 U. S. at 507, 20 S. Ct. at 726.

The suit before us is not to decide what property rights in navigable lakes Wisconsin acquired when it was admitted to the Union in 1848. For that matter, defendants concede that when Wisconsin became a state it acquired the rights it asserts in this suit. Rather, the State claims that it con-

tinues to hold in trust for the public the same property rights it acquired in 1848 and that defendants are infringing those rights. That claim "arises under" federal law, however, only if federal law continues to govern property rights in the beds and waters of navigable Wisconsin lakes. It does not. The grant of statehood to Wisconsin was a grant both of property rights and of sovereign power. In 1848 the United States conveyed to Wisconsin property interests in navigable waters and the power to determine by its own laws the future course of ownership of those interests. "After a State enters the Union, title to the land [under navigable waters] is governed by state law." *Montana v. United States,* 450 U. S. 544, 551, 101 S. Ct. 1245, 1251, 67 L. Ed. 2d 493. Whether the State retains in trust for the public the same title to Wisconsin lake beds and the same fishing and hunting rights in Wisconsin waters it acquired in 1848 is, therefore, entirely a matter of Wisconsin law, subject only to the exercise by the United States of one of its constitutional powers.[3] *Montana, id.; Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.,* 429 U. S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550; *United States v. Holt State Bank,* 270 U. S. 49, 54-55, 46 S. Ct. 197, 198-99, 70 L. Ed. 465; *Shively v. Bowlby,* 152 U. S. 1, 40, 14 S. Ct. 548, 562, 38 L. Ed. 331; *Wilcox v. Jackson,* 38 U. S. (13 Pet.) 498, 517, 10 L. Ed. 264; *Mobil Oil Corp. v. Coastal Petroleum Co.,* 671 F. 2d 419 (11th Cir. 1982); *Heirs of Burat v. Board of Levee Commissioners,* 496 F. 2d 1336 (5th Cir. 1974).

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[3]The State does not contend that federal law requires it to continue to hold in trust for the public the same fishing and hunting rights it acquired in 1848.

In addition to the claim that defendants have infringed property rights it holds in trust for the public, the State makes another claim in its complaint. The State asserts that defendants have no right under the 1854 treaty to regulate public fishing and hunting in any navigable Wisconsin lakes. Complaint ¶¶ 19, 22. There is no question that this claim "arises under" federal law. The State relies directly upon a federal treaty to defeat a federal right—the right to prevent the general public from fishing and hunting in navigable lakes—asserted by the Band in its constitution and 1976 Code and by defendants in enforcement of that Code against the general public. Federal interest in providing a federal forum for a claim that denies the existence of a right founded upon federal law is no less than for a claim that asserts the existence of such right. The rationale for providing federal tribunals for the adjudication of federal rights—that state tribunals might treat federal rights ungenerously—applies equally to both types of claim. That rationale is especially applicable in the case before us where the State in effect claims that its state-created property interests are superior to an Indian tribe's federally-created property interests. See *United States v. Kagama*, 118 U. S. 375, 383, 6 S. Ct. 1109, 1113, 30 L. Ed. 228 ("Because of the local ill feeling, the people of the States where they [Indian tribes] are found are often their deadliest enemies").

But it is the plaintiff that stands to benefit in this suit if a state court casts an unsympathetic eye upon federal rights. That may partly explain why the State initiated this action in one of its own courts and why defendants promptly petitioned for removal to federal court.

At any rate, this fact—that defendants are the claimants of the federal right to be protected from rough treatment at the hands of a state court—raises the question whether the State's claim under the 1854 treaty is well-pleaded.

It was long ago established that a litigant may not gain access to federal court by artful pleading, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194, and that only those allegations necessary to state a claim for the relief requested are to be considered in deciding whether a plaintiff's claim "arises under" federal law. Thus a plaintiff may not "sneak" into federal court by inserting into his complaint federal claims that rebut defenses he anticipates his opponent will raise, *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126. The rationale for this is that the anticipated defense might never be raised, or if it is raised, never reached because the plaintiff fails to prevail on a preliminary issue of state law. There is no federal interest, and a strong state interest, in providing a forum for the litigation of purely state law issues between citizens of the same state. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 164-165 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 227-229 (1948).

Looked at one way, the State's claim that defendants do not have a federal right to exclude the public from navigable lakes looks like an attempt to secure entry into federal court by rebutting an anticipated defense. Had the State sued only for an injunction enjoining defendants from infringing public property rights in navigable lakes, that claim would have arisen only in replication to a claim

by defendants that the 1854 treaty conferred such rights upon them,[4] and a federal court would not have had jurisdiction over it.[5] Looked at another way, however, the State's federal claim looks like an attempt to force litigation of a claim that defendants could bring in federal court. Defendants could have sued in federal court to enjoin state officials responsible for issuing state fishing licenses from licensing persons to fish and hunt in the navigable lakes over which the Band claims jurisdiction. See Wis. Stat. § 844.01 (1973); *Mescalero Apache Tribe v. New Mexico*, 630 F. 2d 724 (9th Cir. 1980), [sic] vacated and remanded, 450 U. S. 1036, 101 S. Ct. 1752, 68 L. Ed. 2d 234, reinstated, 677 F. 2d 55, certiorari granted, — U. S. —, 103 S. Ct. 371, 74 L. Ed. 2d 506. Had they done so, the State's federal claim would have arisen as a defense and a federal court would have had jurisdiction over it.

Looked at the first way—we assume without deciding that the only coercive action the State could bring against defendants is one for an injunction to enjoin a continuing trespass against public property rights in navigable waters (see, *e. g., Baker v. Voss*, 217 Wis. 415, 259 N. W. 413 (1935))—the State's federal claim is not well-pleaded, given that the Declaratory Judgment Act, 28 U. S. C. § 2201, did not expand the original jurisdiction of federal courts. *Skelly Oil, supra*, 339 U. S. at 671-672, 70 S. Ct. at 878-79. Looked at the second way, however, the State's federal claim is well-pleaded. True, it is anticipatory in

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[4]See Wis. Stat. § 844.16 (1973) as to requirements for complaint dealing with interference with real property interest.

[5]The waiver by the United States in 28 U. S. C. § 2409a(a) of its immunity to quiet title actions does not "apply to trust or restricted Indian lands . . .".

that it is a defense to a coercive action defendants could have brought, but have not yet brought, in federal court. But it is precisely this kind of anticipation that the Declaratory Judgment Act was intended to allow. Thus unless the district court was required to look the first way at the State's complaint, it had original jurisdiction over this suit.

When an alleged patent infringer sues for a declaratory judgment that a patent is invalid or uninfringed, he asserts a federal claim that could have arisen either as a replication in a state coercive action, *American Well Works Co. v. Layne & Bowler Co.*, 241 U. S. 257, 36 S. Ct. 585, 60 L. Ed. 987, or as a defense in an action in federal court for patent infringement. It has long been established that federal courts have original subject matter jurisdiction over such a suit. *Graham v. John Deere Co.*, 383 U. S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545 (*sub silentio*); *Jungerson v. Ostby & Barton Co.*, 335 U. S. 560, 69 S. Ct. 269, 93 L. Ed. 235 (*sub silentio*); *Hanes Corp. v. Millard*, 531 F. 2d 585 (D. C. Cir. 1976); *Grip Nut Co. v. Sharp*, 124 F. 2d 814 (7th Cir. 1941); *E. Edelmann & Co. v. Triple-A. Specialty Co.*, 88 F. 2d 852 (7th Cir. 1937); *JFD Electronics Corp. v. Channel Master Corp.*, 229 F. Supp. 514 (S. D. N. Y. 1964); see also *Jewell Ridge Coal Corp. v. Local No. 6167, UMW*, 325 U. S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534 (*sub silentio*). We see no jurisdictional basis for distinguishing a declaratory suit by an alleged patent infringer from the case at bar. Each directly involves a claim of national concern—one that the United States did not confer a monopoly over a certain product; the other that the United States did not confer a monopoly over

fishing and hunting in certain navigable lakes. Each claim necessarily appears—as a logical prerequisite to the declaration requested—in the plaintiff's complaint.[6] Federal interest in providing a federal forum arguably may be greater for suits "arising under" patent law than for suits "arising under" federal Indian treaties given that original jurisdiction over patent suits is exclusive, 28 U. S. C. § 1338—although the danger of state hostility to adverse property claims by American Indian tribes would seem greater than the danger to infringement claims by patent holders—but the difference goes to whether state courts enjoy concurrent jurisdiction, not to whether federal courts enjoy original jurisdiction. And state interest in policing conduct by state officials, as well as federal interest in minimizing friction between federal and state governments, may be greater in the case at bar than in a patent suit, but that difference goes to whether a federal court should abstain from exercising its jurisdiction, not to whether it has original jurisdiction in the first instance. See *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971.

Accordingly, we conclude that the district court had original subject-matter jurisdiction over this action and

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[6]Although the State alleges in its complaint that navigable lakes are not within the Band's reservation and the defendants therefore lack jurisdiction to restrict public fishing and hunting in them, the State does not expressly pray for a declaratory judgment to that effect. But the district court inferred such a prayer from the allegations in the State's complaint, and given that plaintiffs in declaratory judgment suits define their own causes of action and that six and one-half years have elapsed since the State filed suit, we are not prepared to insist on a more restrictive interpretation of the State's complaint.

that removal from state court under 28 U. S. C. § 1441 was proper.[7]

II. *Sovereign Immunity*

We have yet another jurisdictional threshold to cross before reaching the merits of this appeal. In the district court, defendants moved to dismiss this suit on the ground that though the State's complaint named individual members of the Band as defendants, the suit was in effect against the Band and the Band enjoyed sovereign immunity from suit. The district court denied the motion, holding that because the 1854 treaty did not confer upon the Band exclusive fishing and hunting rights in navigable lakes, defendants acted beyond the scope of their authority as members of the Band's governing board when they restricted public fishing and hunting in navigable lakes. 524 F. Supp. at 734-735; see also *Bouchard*, 464 F. Supp. at 1380-1383. On appeal, defendants continue to assert the validity of their sovereign immunity defense but claim that in order to have this controversy resolved on the merits, the Band waived its immunity from this suit by tribal resolution four months after the district court entered final judgment against defendants. They argue that because of this post-judgment waiver, the question whether the Band's sovereign immunity bars this action is now moot, and that we should therefore vacate the district court's ruling on that question. If we choose not to vacate

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[7]Because we hold that the State's claim that defendants lack federal jurisdiction to restrict public fishing and hunting "arises under" federal law, we need not consider the State's novel contention that Indian tribes are covered by the Tenth Amendment and that defendants' enforcement of the Code against non-Indians is a violation of that Amendment.

the district court's sovereign immunity ruling, defendants urge us to reverse it.

When circumstances beyond an appellant's control render moot a question decided and appealed from, a federal appellate court will vacate the decision below. *Great Western Sugar Co. v. Nelson,* 442 U. S. 92, 99 S. Ct. 2149, 60 L. Ed. 2d 735; *Duke Power Co. v. Greenwood County,* 299 U. S. 259, 57 S. Ct. 202, 81 L. Ed. 178. The rationale is that preclusive effect should not be accorded a judgment from which a litigant has the right of appeal when he is unable to exercise that right. *Great Western Sugar Co.,* 442 U. S. at 93-94, 99 S. Ct. at 2149-50; *United States v. Munsingwear, Inc.,* 340 U. S. 36, 39-40, 71 S. Ct. 104, 106-07, 95 L. Ed. 36. Were it otherwise, winning litigants could prevent reversal of erroneous decisions by deliberately mooting cases on appeal, *Federal Trade Commission v. Food Town Stores, Inc.,* 547 F. 2d 247, 249 (4th Cir. 1977), and the preclusive effect of appealable judgments in cases mooted on appeal would be greater than in cases susceptible of review.

Circumstances beyond defendants' control have not prevented them from exercising their right of appeal from the judgment below. They exercised that right by filing a notice of appeal and later voluntarily attempted to waive the sovereign immunity defense in this Court in the apparent hope of escaping the preclusive effect of the district court's rejection of that defense. Had they decided not to file a notice of appeal, or had they simply abandoned their appeal after filing it, the district court's adverse sovereign immunity decision would not have been deprived of preclusive effect. *Federated Department Stores v.*

Moitie, 452 U. S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103; *Hubbell v. United States*, 171 U. S. 203, 18 S. Ct. 828, 43 L. Ed. 136; *Wilson's Executor v. Deen*, 121 U. S. 525, 7 S. Ct. 1004, 30 L. Ed. 980. We see no reason why it should be otherwise when defendants file a notice of appeal and then purport to waive a defense advanced and thoroughly litigated before the district court.[8] See *Cover v. Schwartz*, 133 F. 2d 541, 546-547 (2nd Cir. 1942), certiorari denied, 319 U. S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703. Defendants gambled when they chose to litigate the sovereign immunity issue in district court and they lost. Just as winning litigants may not bolster the preclusive effect of final judgments by deliberately mooting questions on appeal, so losing litigants may not destroy their preclusive effect by adopting the same ploy. Whether sovereign immunity bars this suit was a live issue when the district court decided it, and defendants' change of heart on appeal has not effected a loss of life below.[9]

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[8]Defendants' attempt to waive immunity retroactively is tantamount to a Rule 15(d) motion under the Federal Rules of Civil Procedure to file a supplemental answer relating back to their original pleading. Such motions are routinely denied when granting them would upset a concluded or well-advanced litigation. *United States v. Wissohickon Tool Works, Inc.*, 200 F. 2d 936 (2nd Cir. 1952); *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 90 F. R. D. 40 (N. D. Ill. 1981) ("What plaintiffs here seek to reverse, however, is not an unwitting omission in the pleadings but a conscious decision which has shaped the conduct of this litigation for the past seventeen months."); *United States v. International Brotherhood of Electrical Workers, Local 130*, 72 F. R. D. 507 (E. D. La. 1976); *Ebel v. Drum*, 55 F. Supp. 186 (D. Mass. 1944).

[9]We do not mean to suggest that a sovereign may not exercise its powers retroactively. Cf. *Flower Cab Co. v. Petitte*, 685 F. 2d 192 (7th Cir. 1982). To apply new standards to past conduct is, however, one thing; to apply new litigation tactics to an already adjudicated litigation is quite another.

Even assuming that the Band had the power to waive its sovereign immunity after the adverse decision on that issue, see *United States v. Oregon*, 657 F. 2d 1009 (9th Cir. 1981); *Merrion v. Jicarilla Apache Tribe*, 617 F. 2d 537 (10th Cir. 1980), affirmed, 454 U. S. 886, 102 S. Ct. 379, 70 L. Ed. 2d 201, it is doubtful whether the Band did in fact successfully waive it in this case. While this appeal was pending, defendants—in their capacity as members of the Band's governing board—adopted a resolution authorizing their attorneys of record to waive the Band's sovereign immunity to this suit.[10] In their briefs filed with this Court, defendants characterize this resolution as a waiver. We see no proper basis for that characterization. The language in the resolution is that of delegation, not waiver. The resolution purports only to delegate to defendants' appellate attorneys the power to waive the Tribe's immunity to this suit. Nothing in it purports to waive that immunity. See n. 4 *supra*. Nor does it appear—assuming that the Band has the power to authorize its attorneys to waive its immunity on its behalf—from the record before us that defendants' attorneys ever exercised the power delegated to them. We are aware of no formal waiver executed by defendants' attorneys, nor does an express waiver of immunity appear any-

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[10]The relevant part of the post-judgment resolution reads:

Now, Therefore, Be It Hereby Resolved, that the Governing Board of the Lac Courte Oreilles Tribe hereby authorizes its attorneys of record on appeal in this case to waive the defense of sovereign immunity of the Tribal Governing Board on the issue of whether the Tribe has reserved to it the exclusive and/or preferential use of the navigable waters within the boundaries of the Lac Courte Oreilles Reservation for fishing, hunting, and ricing.

App. 75a.

where in defendants' briefs filed on appeal. Thus to find a waiver one must read between the lines of defendants' briefs. Though we are loath to do so given the jealousy with which federal law guards against forfeiture of American Indian rights, *see Santa Clara Pueblo v. Martinez,* 436 U. S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting *United States v. Testan,* 424 U. S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114), because defendants argue for reversal of the ruling denying sovereign immunity in the same breath that they claim to have waived immunity, we think that if defendants did intend to effect some sort of waiver before this Court, at most they intended to condition that waiver upon our applying it retroactively to vacate the district court's ruling against sovereign immunity. Since a waiver now does not moot issues that were properly before the district court, defendants have not lost their right of appeal by waiving their immunity before this Court. Cf. *Cover v. Schwartz,* 133 F. 2d 541 (2nd Cir. 1942), certiorari denied, 319 U. S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703.

Defendants contend that absent an effective waiver they are immune from this suit first because the Band is immune from suit and secondly because they acted on behalf of the Band when they attempted to restrict public fishing and hunting in navigable lakes. The district court rejected defendants' second contention, holding that because the 1854 treaty did not confer upon the Band power to restrict public fishing and hunting in navigable lakes, defendants were not acting on behalf of the Band when they attempted to exercise such power. Defendants argue

that the district court erred in looking to the 1854 treaty to determine the scope of their authority as Band officials. They argue that the constitution of the Band, not the 1854 treaty, defines the limits of their authority to act on behalf of the Band and that the Band's constitution does indeed authorize members of its Governing Board to restrict public fishing and hunting in navigable lakes.

At a superficial level, defendants' argument is appealing. A federal official is immune from suit unless a plaintiff alleges either that the United States did not delegate to the official the power to act as he did or that his exercise of that power violates the federal Constitution. *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628. By analogy, defendants should be immune from suit unless the State alleges in its complaint either that the Band did not delegate to defendants the power to restrict public fishing and hunting or that the exercise of that power violates that Constitution.

But the argument has a fatal flaw: The argument assumes that common law sovereign immunity protects a sovereign's officials from suit even when they set out to do what their sovereign lacks the power to do. It does not. When a federal officer—or state officer for that matter—violates the federal Constitution, he exercises a power that his sovereign does not enjoy. That is the rationale for stripping him of his authority and immunity as a federal or state officer: viz., he has exercised a power that his sovereign was powerless to convey to him.[11] See *Ex Parte*

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[11]It is apparently an unsettled question whether state officials enjoy immunity from suit when they violate a federal statute that creates a private right of action. Cf. *Maine v. Thiboutot*, 448 U. S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555; *Adden v. Middlebrooks*, 688 F. 2d 1147 (7th Cir. 1982).

Young, 209 U. S. 123, 160, 28 S. Ct. 441, 454, 52 L. Ed. 714. By analogy, an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him.

By and large, however, limitations upon the sovereignty of Indian tribes are found not in the federal Constitution, see *Talton v. Mayes*, 163 U. S. 376, 16 S. Ct. 986, 41 L. Ed. 196, but in the federal statutes and treaties by which the United States exercises its plenary power to restrict tribal sovereignty, see *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295, at least, that is, plenary power to restrict tribal sovereignty over non-tribal members. *Montana v. United States*, 450 U. S. 544, 563-564, 101 S. Ct. 1245, 1262-63, 67 L. Ed. 2d 493; *United States v. Wheeler*, 435 U. S. 313, 326, 98 S. Ct. 1079, 1087, 55 L. Ed. 2d 303, and its power to extinguish the sovereign immunity of Indian tribes, *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106. The Constitution of the United States apportions sovereign power between the United States and the several states, not among the United States, the several states, and the Indian Tribes. Were Indian officials susceptible to suit only whenever they either violated the federal Constitution or exceeded the powers delegated to them by their tribe, they would enjoy an immunity from suit far broader in scope than that enjoyed by federal and state officials. A tribal official would enjoy immunity from suit whenever he exercised a power delegated to him by his tribe even if his tribe were powerless to make the delegation. Federal and state officials enjoy an immunity from suit coterminous with fed-

eral and state sovereignty and there is no reason why federal common law should afford Indian officials broader immunity than federal and state officials enjoy. See *Swift Transportation, Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418 (D. Ariz. 1981). "Immunity from suit is an attribute of sovereignty," *Nevada v. Hall*, 440 U. S. 410, 415, 99 S. Ct. 1182, 1185, 59 L. Ed. 2d 416, a privilege that attaches to sovereign rank. If a sovereign's powers are limited, then so too must the immunity of that sovereign's officials be limited.

Defendants do not contend that the sovereignty of the Band over navigable lakes and Wisconsin citizens fishing and hunting in those lakes is unlimited. They concede that whatever sovereignty the Band enjoys over public fishing and hunting derives from the 1854 treaty. We therefore conclude that the district court did not err in holding that defendants enjoy immunity from this suit only if the 1854 treaty conferred upon the Band the power that the Band in turn conferred upon defendants to restrict public fishing and hunting in navigable lakes. Since the treaty did not do so (*infra* Part III), defendants' sovereign immunity defense must fail.

III. *The Effect of the 1854 Treaty Upon State Sovereignty Over Navigable Waters*

The 1854 treaty between the United States and the Chippewa Indians reserved "for the use of" the Band a tract of land in central Wisconsin "equal in extent to three townships." Nineteen years after the signing of that treaty, the United States and the Band prepared a list of land parcels—with a total dry acreage (about 69,120) roughly

equivalent to that of three townships—included within the tract reserved to the Band, and three years later, the United States surveyed those land parcels and prepared a map designating the outer boundaries of the Band's reservation. Defendants claim that nineteen navigable lakes are wholly or partly within those outer boundaries, that the 1854 treaty conferred upon the Band the exclusive right to fish and hunt in the waters of those lakes, and that defendants therefore enjoy the power to restrict public fishing and hunting in those lakes. The State of course denies each of these claims. The district court found that though the outer boundaries of the reservation do encompass or intersect nineteen navigable lakes, and though the Band understood in 1854 that it would enjoy exclusive fishing and hunting rights in all waters within the outer boundaries of its reservation, the 1854 treaty did not confer such rights upon the Band, and the Band therefore lacks jurisdiction to restrict public fishing and hunting in navigable lakes. On appeal, defendants argue that the district court erred in holding that the fishing and hunting rights conferred upon the Band are not exclusive.

There are weighty reasons for presuming that the 1854 treaty did not confer upon the Band exclusive hunting and fishing rights in navigable Wisconsin lakes. In 1846, the United States authorized the people of Wisconsin "to form a constitution and State government, for the purpose of being admitted into the Union on an equal footing with the original States in all respects whatsoever. . . ." Wisconsin Enabling Act of 1846, 9 Stat. 56. Pursuant tc that grant of authority, the people of Wisconsin adopted a constitution providing for a republican form of government, and in 1848 Wisconsin became a state and a government

elected by the people of Wisconsin was vested with all of the same powers possessed by the governments of the original thirteen states. Act of March 3, 1847, 9 Stat. 178. The power to regulate fishing and hunting in navigable lakes is one of those powers, *Montana v. United States,* 450 U. S. 544, 551-552, 101 S. Ct. 1245, 1251, 67 L. Ed. 2d 493, and exercising that power so as to "promote the happiness and prosperity" of the people that elected it is one of the primary responsibilities of the Wisconsin government, *Charles River Bridge v. Warren Bridge,* 36 U. S. (11 Pet.) 420, 547, 9 L. Ed. 773. Because the people of Wisconsin have a compelling interest in seeing that powers reposed in their government are not surrendered to private, non-representative groups, and because the continued vitality of our Union ultimately depends upon the continued faith of the public in their elected governments, we are loath to adopt an interpretation of the 1854 treaty that would divest the State of this power. *Massachusetts v. New York,* 271 U. S. 65, 89, 46 S. Ct. 357, 361, 70 L. Ed. 838; *Charles River Bridge, supra,* 11 Pet. at 547, 9 L. Ed. 773. Thus regardless of whether the Chippewas believed in 1854 that their treaty with the United States conferred upon them the power to prohibit public fishing and hunting in navigable lakes, unless it plainly appears that the United States intended to divest Wisconsin of some of its sovereignty over non-Indians, we will not interpret the treaty as conferring that power upon the Chippewas.[12]

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[12]In a case argued on the same day as the one before us, this Court adopted the rule that Indian treaties are to be interpreted as the Indians who negotiated them understood them. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v.

(Continued on next page)

The United States shares the interest of the Wisconsin citizenry in preserving state sovereignty. It under-

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(Continued from previous page)

Voight, — F. 2d —, Nos. 78-2398, 78-2443, 79-1014 (7th Cir. Jan. 25, 1983). The rationale for this rule is that federal law should resolve ambiguities in treaty language against the party best equipped to prevent them and it is less burdensome for the United States to communicate its intentions unambiguously in a treaty drafted in English than it is for a tribe of non-English-speaking Indians to discern the precise meaning of technical language in a treaty. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U. S. 658, 675-676, 99 S. Ct. 3055, 3069, 61 L. Ed. 2d 823; *Voight* at —. Resolving disputes about meaning in favor of the Indians is a way of encouraging the United States to express itself more plainly when it drafts a treaty negotiated with the Indians, and thereby ensuring that agreements between the United States and the Indians are voluntary in the sense that the Indians understand the terms of those agreements. See *Choctaw Nation v. Oklahoma*, 397 U. S. 620, 630-631, 90 S. Ct. 1328, 1334, 25 L. Ed. 2d 615.

Our decision not to afford the Indians' understanding of the 1854 Treaty controlling weight in this case is not at odds with our holding in *Voight*. There are other concerns besides facilitating communication between the United States and the Indians that may come into play when a court is asked to resolve a dispute regarding the interpretation of an Indian treaty. Preserving the power of state governments to promote public welfare is one such concern, *Charles River Bridge, supra* 11 Pet. at 547, 9 L. Ed. 773, and it is a weightier one than is the concern for facilitating communication between the United States and the Indians. Thus when, as in the case before us, interpreting a treaty as the Indians understood it would have the effect of divesting a state of some of its sovereign power over non-Indians, we will not adopt a rule that requires us to interpret the treaty as the Indians understood it. *Montana*, 450 U. S. at 552-553, 101 S. Ct. at 1251-52; *id.* at 567-568, 101 S. Ct. at 1265 (Stevens, J. concurring). *Voight* did not involve a challenge to a state's sovereignty over non-Indians. The issue before us in *Voight* was whether pre-statehood treaties between the United States and Chippewa Indian tribes conferred upon the Chippewas a conditional right to fish and hunt on public lands. We held that the treaties did confer such a right and we remanded the case to the district court for a determination as to the permissible scope of state regulation.

took to admit Wisconsin into the Union on an "equal footing" with the original states. Presumably that undertaking reflects a belief that it is better to distribute power evenly than unevenly throughout a union of states and that a local government is better able than a national government to promote public welfare in matters of local concern. We know of no reason to suppose that the United States abandoned these beliefs in the six years between the date it admitted Wisconsin into the Union on an "equal footing" with the other states and the date the United States reserved "for the use of" a band of Chippewa Indians some sixty-nine thousand acres of dry land in Wisconsin.

Even assuming that the Constitution empowers the United States to effect a post-statehood conveyance of sovereignty over navigable state lakes to a band of Indians, we must therefore presume—absent evidence of a contrary intention "definitely declared or otherwise made plain," or of a "public exigency" sufficient to warrant an inference of such an intention—that the United States did not exercise that power in 1854 when it signed a treaty with the Chippewa Indians. *Montana, supra,* 450 U. S. at 552, 101 S. Ct. at 1251, quoting *United States v. Holt State Bank,* 270 U. S. 49, 55, 46 S. Ct. 197, 199, 70 L. Ed. 465. Defendants argue that the importance to the Band of fisheries secure from the threat of public invasion was sufficiently great in 1854 to overcome this presumption. The district court disagreed and so do we. There is nothing in the language or history of the treaty to suggest that in 1854 the United States was more solicitous of Chippewa fishing and hunting rights in navigable waters than of state sovereignty. See *Montana, supra* 450 U. S. at 556,

101 S. Ct. at 1253; compare *Choctaw Nation v. Oklahoma,* 397 U. S. 620, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (treaty in which United States granted Indian tribe lands in fee simple and expressly pledged that "no Territory or State shall ever have a right to pass laws for the government of the [tribe] . . . and that no part of the land granted to them shall ever be embraced in any Territory or State" held to confer upon tribe sovereignty over navigable river given history of injustice suffered by tribe), construed in *Montana,* 450 U. S. at 555-556 n. 5, 101 S. Ct. at 1253 n. 5, and *Alaska Pacific Fisheries v. United States,* 248 U. S. 78, 39 S. Ct. 40, 63 L. Ed. 138 (*pre-statehood* reservation "until otherwise provided by law" of group of islands for use of tribe that sustained itself by fishing in navigable waters adjoining those islands held to convey to tribe exclusive right to fish in those navigable waters). The Chippewas may have feared in 1854 that public fishing and hunting in navigable lakes within their reservation would one day threaten their fisheries—although that day has apparently not yet come, since defendants do not contend that public fishing and hunting pose an imminent threat to the "political integrity, the economic security, or the health or welfare" of the Band. *Montana, supra* 450 U. S. at 566, 101 S. Ct. at 1258. And the Chippewas may have believed that when that day came they would possess the power to exclude the public from their fisheries. But neither the history of Chippewa life prior to 1854 nor the level of public fishing and hunting in waters near Chippewa settlements in 1854 was such as to charge the United States with knowledge of the Chippewas' understanding or to warrant the inference that the United States intended to convey such a power. See District Court Findings of

Fact Nos. 40-58 at 524 F. Supp. 729-730. Nor can we say that in 1854 the United States was so intent upon preserving tribal life that had it foreseen that public fishing and hunting would one day threaten Chippewa fisheries it would have divested Wisconsin of some of its sovereignty. Section three of the 1854 treaty reserves to the President of the United States the power to allot parcels of reservation land to individual members of the Band, and in 1875, the President began to exercise that power. From the 1840's to the early 1900's the United States employed this practice—converting tribal property to individual property by allotting reservation lands to individual Indians—in an effort to "civilize" Indians and destroy their tribal ways of life. See F. Cohen, *Handbook of Federal Indian Law*, ch. 11 (1942).

In sum, because the 1854 treaty did not expressly reserve exclusive rights in navigable waters (see *Blake v. Arnett*, 663 F. 2d 906, 911 (9th Cir. 1981)), Finding No. 83, 524 F. Supp. at 732, and because circumstances in 1854 were not such as to justify an inference that the United States intended to reserve such rights, we agree with Judge Doyle that the 1854 treaty did not convey to the Band sovereignty over navigable waters within its reservation and that exclusive sovereignty over them is in the State. 524 F. Supp. at 733-735.

IV. *The State's Cross-Appeal*

In its opinion, the district court expressly found that the outer boundaries of the Band's reservation encompass navigable lakes. 524 F. Supp. at 734-735 n. 2; *id.* at 732-733, Findings Nos. 86, 87. That finding is also implicit in the reference to "navigable waters lying within the outer

boundaries of the Lac Courte Oreilles Reservation" in the district court's final judgment. App. 74a. In its cross-appeal, the State contends that this finding is erroneous. It argues that the Band had no understanding in 1854 about whether the boundaries of its reservation would be drawn so as to include navigable lakes, that when the Band selected parcels of land in 1873 to be included among the 69,120 acres of land comprising its reservation, it excluded meandered waters in order to maximize its acreage of dry land, that the acreage of dry land within the reservation equals 69,120 and that any exclusive rights in navigable waters that the Band enjoys, it enjoys by reason of its ownership of riparian lands, not by reason of any conveyance by the United States of such rights.

We need not decide in this case whether the outer boundaries of the Band's reservation encompass navigable lakes because regardless of whether they do, defendants lack jurisdiction to restrict public fishing and hunting in them.[13] We therefore vacate the district court's finding on that issue, and order that the district court's appended judgment be modified by substituting "lakes adjacent to the dry lands of the Lac Courte Oreilles Reservation" for

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[13]We do not decide today whether the Band enjoys fishing and hunting rights in these navigable lakes superior to those enjoyed by the general public. We decide only that the Band does not enjoy jurisdiction to restrict public fishing and hunting in them. Defendants argue that even if the Band's fishing and hunting rights in navigable waters near its reservation are not exclusive, they are certainly superior to the public's fishing and hunting rights in those waters. That may be (see *Puyallup Tribe, Inc. v. Department of Game*, 433 U. S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667), but even then defendants would be unable to regulate the public. Furthermore, defendants did not raise this argument below, a requisite for consideration here.

that part of the first sentence of the judgment after "navigable" and by substituting the same phrase for that part of the third sentence of the judgment after "navigable" through "October 23, 1981".

Affirmed as modified.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

Civil Action No. 76-C-359

STATE OF WISCONSIN,

Plaintiff,

vs.

ODRIC BAKER, et al.,

Defendants.

JUDGMENT

This action came on for trial before the Court, Honorable JAMES E. DOYLE, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that there resides in the State of Wisconsin exclusive jurisdiction to regulate hunting and fishing activities by non-members of the Lac Courte Oreilles Band on and in the navigable waters lying within the outer boundaries of the Lac Courte Oreilles Reservation, as those boundaries are defined in finding 86, in the opinion and order entered on October 23, 1981.

Defendants enjoy no jurisdiction to regulate hunting and fishing activities by such non-members on and in such navigable waters.

It is Further Ordered and Adjudged that defendants, their successors in office, their agents and employees are enjoined from enforcing or attempting to enforce against any non-members of the Lac Courte Oreilles Band on any navigable water[s] lying within the outer boundaries of the Lac Courte Oreilles Reservation, as defined in finding 86, in the opinion order entered on October 23, 1981, the provisions of Section VIII of the Fishing, Hunting, Trapping, and Ricing Code of the Lac Courte Oreilles Band, which was implemented on or about May 24, 1976.

It is Ordered and Adjudged that plaintiff recover of defendants its costs of action.

Approved as to form:

Dated this 26th day of October, 1981.

BY THE COURT:
/s/ JAMES E. DOYLE
District Judge

Dated at Madison WI, this 26th day of October, 1981.

/s/ JOSEPH W. SKUPNIEWITZ
Clerk of Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

76-C-359

STATE OF WISCONSIN,

Plaintiff,

v.

ODRIC BAKER, individually and as Chairman, Lac Courte Oreilles Tribal Governing Board; PETE LARSON, individually and as Vice Chairman, Lac Courte Oreilles Tribal Governing Board; MARGARET DIAMOND, individually and as Secretary-Treasurer, Lac Courte Oreilles Tribal Governing Board; CHARLES DIAMOND, Individually and as a member, Lac Courte Oreilles Tribal Governing Board; THERESA WILLIAMS, Individually and as a member, Lac Courte Oreil-Les Tribal Governing Board; RICK St. GERMAINE, individually and as a member, Lac Courte Oreilles Tribal Governing Board, and their agents, employees, and subordinates,

Defendants.

PRELIMINARY INJUNCTIVE ORDER

Filed July 9, 1976

This action for a declaratory judgment was commenced in the Circuit Court for Sawyer County, Wisconsin, and removed to this court by the defendants whose petition for removal cites 28 U. S. C. § 1441(b). Plaintiff has not challenged the propriety of the removal. Plaintiff has moved for a preliminary injunction, and it is to this motion that this order is addressed.

A memorandum explaining the basis for this order will be entered shortly.

Plaintiff's motion for a preliminary injunction is granted in part and denied in part, and the form of the injunction sought is modified in part, as follows:

It is ordered that, effective at noon, Central Daylight Time, on July 13, 1976, and until further order of the court:

(1) The defendants, their agents and employees are enjoined from enforcing or attempting to enforce against any non-member of the Lac Courte Oreilles tribe on all of Lake Courte Oreilles, all of Grindstone Lake, and all of the Chippewa Flowage (also known as Lake Chippewa), the provisions of Section VIII of the Fishing, Hunting, Trapping, and Ricing Code of the Lac Courte Oreilles Band, which was implemented on or about May 24, 1976.

(2) Defendants and their agents and employees shall impound and hold in a separate banking account any and all fees collected after noon on July 13, 1976, from non-members of the tribe, pursuant to the provisions of said Section VIII of said Code, and also preserve the names and addresses of all such persons from whom said fees may be collected.

(3) Either party may apply for a modification of this preliminary injunction at any time. More particularly, plaintiff may renew its motion for injunctive relief with respect to navigable waters other than those specified in this order, if accompanied by a factual showing beyond that made to date. Also more particularly, defendants may propose a modification of the injunctive order to embody any practical plan for limiting the enforcement of Section VIII to those portions of Lake

Courte Oreilles, Grindstone Lake, and the Chippewa Flowage (also known as Lake Chippewa) which may lie within the boundaries of the reservation. I imply nothing with respect to the nature of the court's ruling on any such motions if they are served and filed.

Entered this 9th day of July, 1976.

BY THE COURT:
/s/ James E. Doyle
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

76-C-359

STATE OF WISCONSIN,

Plaintiff,

v.

ODRIC BAKER, individually and as Chairman, Lac Courte Oreilles Tribal Governing Board; PETE LARSON, individually and as Vice Chairman, Lac Courte Oreilles Tribal Governing Board; MARGARET DIAMOND, individually and as Secretary-Treasurer, Lac Courte Oreilles Tribal Governing Board; CHARLES DIAMOND, Individually and as a member, Lac Courte Oreilles Tribal Governing Board; THERESA WILLIAMS, Individually and as a member, Lac Courte Oreilles Tribal Governing Board; RICK St. GERMAINE, individually and as a member, Lac Courte Oreilles Tribal Governing Board, and their agents, employees, and subordinates,

Defendants.

OPINION

Filed July 12, 1976

This opinion is entered in explanation and support of the preliminary injunctive order entered herein July 9, 1976.

The burden of persuasion is on the movant for a preliminary injunction and the record presented to this court as of July 9, 1976, is inadequate for the purpose of supporting any injunctive relief in the absence of rather liberal use of my powers of judicial notice. That record consists of the following:

(1) A copy of an unverified complaint dated May 27, 1976, in an action commenced by the plaintiff against the defendants on or about said date in the Circuit Court for Sawyer County, Wisconsin.

(2) Attached to the copy of said complaint is a copy of Exhibit C to said complaint (consisting of a February 24, 1873, letter to the Secretary of the Interior transmitting the selection of lands for a permanent reservation for the Lac Courte Oreilles Bands of Chippewas of Lake Superior, and a March 1, 1873, letter by the Secretary revealing that he had received the February 24, 1873, letter) but not Exhibit A (described in the complaint as the Fishing, Hunting, Trapping and Ricing Code allegedly promulgated by the defendants during May, 1976, to be effective May 24, 1976), or Exhibit B (described in the complaint as the Tribal Court Code of the Lac Court Oreilles Band, which allegedly became effective May 24, 1976).

(3) A notice of a motion for temporary injunction, and a motion for temporary injunction, by the plaintiff, dated May 27, 1976, in the action in the Circuit Court for Sawyer County, Wisconsin, seeking to enjoin defendants from enforcement against non-members of the tribe of Section VIII of the Fishing, Hunting, Trapping, and Ricing Code on all of Lake Courte Oreilles, all of Grindstone Lake, and all of the Chippewa Flowage (also known as Lake Chippewa).

(4) A petition by defendant Odric Baker, dated June 3, 1976, and verified by him, in part of his own

knowledge and in part on information and belief, for removal of plaintiff's action to this court from the Circuit Court for Sawyer County, and a notice to the plaintiff that said petition for removal had been filed in this court on June 4, 1976.

(5) A notice of motion and motion, in this court by plaintiff for a preliminary injunction seeking to enjoin defendants from enforcement against non-members of the tribe of Section VIII of the Fishing, Hunting, Trapping, and Ricing on all navigable bodies of water within and around the exterior boundaries of the reservation, including Lake Courte Oreilles, Grindstone Lake, Little Courte Oreilles Lake, Blueberry Lake, Devils Lake, Ashegon Lake, Pike Lake, Indian Lake, Green Lake, Gurno Lake, Christner Lake, and Lake Chippewa (also known as the Chippewa Flowage).

(6) Ten affidavits, six of them hearsay, to the effect that persons wearing Lac Courte Oreilles tribal wardens' uniforms had approached persons, who apparently are not members of the tribe and who were fishing in various waters in Sawyer County, Wisconsin, during a period commencing May 25, 1976, through June 10, 1976, and had advised such persons that they could not fish in such waters without tribal permits; that one such person was issued a summons to appear in the tribal office the following day; that seven were told they could continue to fish the rest of the day but would need a license next time; that one was

told that if she continued to fish without a tribal license, she would be issued a citation, and was threatened with the loss of her boat if a citation were issued and if she did not appear; that two encountered tribal wardens whose "disposition" was "belligerent"; and that, of these persons, two departed from the resort at which they were guests, on the day of the incident and because of the incident, which day was one day earlier than their scheduled date of their departure.

(7) One affidavit by an officer of two resort associations in Sawyer County, stating how many resorts are located on various bodies of water in Sawyer County and containing an estimate of how many persons use certain bodies of water there during a summer month.

(8) Government survey maps of the townships within which the Lac Courte Oreilles reservation lies, showing the meandered lakes.

(9) A notice of motion, and motion, by defendants to dismiss this action.

(10) A notice of motion, and motion, by defendants to establish a briefing schedule and hearing date on defendants' motion to dismiss, and to postpone a hearing scheduled for July 1, 1976, on plaintiff's motion for a preliminary injunction; an affidavit by defendants' counsel in support of said motion; and an order by the court denying the motion for postponement of the July 1, 1976, hearing.

(11) A notice of motion, and motion, by certain parties for leave to intervene as defendants.

(12) An affidavit by defendant Baker containing certain allegations on the basis of his "personal knowledge of my Band's oral history and traditions and on the basis of records that have been available to me as chairman of the Tribal Governing Board," and relating to the history of the Band and of the reservation and to the philosophy of the members of the Lac Courte Oreilles Band with respect to land and waters and fishing and ricing.

The briefs of the parties in support of plaintiff's motions for a preliminary injunction, and in opposition to it, are replete with factual allegations by counsel unsupported by the record.

Despite the meagerness of the record as described, it appeared from oral argument that there is little dispute as to certain matters, that judicial notice is clearly proper as to the others, that liberal exercise of judicial notice may be appropriate as to yet others, that the hearsay affidavits submitted by the plaintiff are probably reliable, and that reasonably prompt judicial response to plaintiff's motion is probably important to significant members of people affected by the controversy. Accordingly, for the purpose of acting upon plaintiff's motion for a preliminary injunction and only for that purpose, I find as fact those matters set forth hereinafter, under the heading "Facts."

FACTS

I take judicial notice of all relevant provisions of the federal and state constitutions, federal treaties, federal and state statutes, presidential executive orders, duly promulgated regulations of federal and state executive departments and administrative agencies, the constitution and by-laws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, and codes duly promulgated by said Band, particularly U. S. Const., Art. II, Sec. 2, Clause 2, Art. VI, Sec. 2, Amendment V; Wis. Const., Art. IX, Sec. 1; Treaty of July 29, 1837, 7 Stat. 536; Treaty of October 4, 1842, 7 Stat. 591; Treaty of September 30, 1854, 10 Stat. 1109; 25 U. S. C. § 476 et seq.; 1 U. S. Stat. 50; 9 U. S. Stat. 561; 25 U. S. C. § 461; P. L. 94-114, 88 U. S. Stat. 577; 18 U. S. C. §§ 1162(b), 1165; 43 U. S. C. § 1311; Wis. Stat., ch. 30; Wis. Stat. §§ 29.02, 29.01(1), 31.06, 144.025; presidential executive order of February 6, 1850; NR 20.03, Wis. Adm. Code; Constitution and By-Laws of the Lac Courte Oreilles Band, approved November 2, 1966, as amended December, 1974; and Tribal Court Code and Fishing, Hunting, Trapping and Ricing Code of said Band, both promulgated in May, 1976.

I take judicial notice that Wisconsin became a state May 29, 1848.

I take judicial notice that in the reservation for the Lac Courte Oreilles Band established in 1873, there was included land totalling about 69,136.41 acres; that somewhat more than one-half of this land acreage has been allotted, patented, sold, and is now held in fee by nonmembers of the Band; that wholly within the exterior boundary of said reservation lie Little Courte Oreilles

Lake, Blueberry Lake, Devils Lake, Ashegon Lake, Pike Lake, Indian Lake, Green Lake, Gurno Lake and Christner Lake, and perhaps other lakes; that partly within and partly without the exterior boundary of said reservation lie Lake Courte Oreilles, Grindstone Lake, and Lake Chippewa (also known as the Chippewa Flowage), and perhaps other lakes; that the waters of all of the above-named lakes are navigable; that among the parcels of land within the reservation now held in fee by non-members of the band is land located on the shores of Lake Courte Oreilles, Grindstone Lake, Lake Chippewa (also known as the Chippewa Flowage), Blueberry Lake, and perhaps other lakes.

I take judicial notice that as of about May 24, 1976, for a period of years prior thereto, and continuously since that date, the Wisconsin Department of Natural Resources had required persons (other than members of the Band) desiring to fish in the above-named lakes to obtain a license from said department for which a monetary fee is charged.

I take judicial notice that as of about May 24, 1976, there became effective a Tribal Court Code and a Fishing, Hunting, Trapping and Ricing Code, promulgated by the duly constituted authority within the Band, requiring non-members of the Band (between the ages of 16 and 65) desiring to fish in the above-named lakes to obtain a tribal license for which a monetary fee of $4.25 is to be charged, with provisions for enforcement proceedings in a tribal court, and for fines not to exceed $500 or incarceration for not more than six months, or both such fines and incarceration, for violation of the Code.

Since about May 24, 1976, and continuously until the present, defendants and their agents and employees have demanded of non-members of the Band who fish in the above-named lakes that they obtain a tribal fishing license, have issued tribal court citations to some of such non-members who have fished in said lakes without a tribal license, have threatened to enforce the penalties for fishing without a tribal license, and have sold tribal licenses to some non-members who have applied for them. Unless restrained by order of a court of competent jurisdiction, defendants and their agents and employees will continue to engage in the enforcement of the tribal licensing requirements.

During the summer months, thousands of non-members of the Band usually fish in the above-named lakes, and particularly in Lake Courte Oreilles and Lake Chippewa (also known as the Chippewa Flowage).

OPINION

Although the complaint herein, filed and served as it was in a state court, does not allege that federal jurisdiction is present, defendants apparently considered when they petitioned for removal under 28 U. S. C. § 1441(b) that this court enjoys original jurisdiction over plaintiff's claim, and plaintiff has acquiesced in this view.[1] I do not understand the compatibility of the petition for removal with defendants' contention, in their brief in opposition to the motion for a preliminary injunction, that federal jurisdiction is absent.

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[1]In their brief in opposition to plaintiff's motion for a preliminary injunction, defendants refer to plaintiff's "amended complaint." No amended complaint has been filed herein.

The central issue in the case appears to be whether the Lac Courte Oreilles Band enjoys the power to regulate fishing by non-members in navigable lakes lying within the exterior boundary of its reservation and lying partially within and partially without said boundary. It does not appear that this very issue has been adjudicated with respect to this reservation.

Plaintiff makes a strong showing that under the Northwest Ordinance, the Constitution of the United States, the act of Congress enabling Wisconsin to become a state, decisions of the Supreme Court of the United States, the Wisconsin Constitution, Wisconsin statutes, and decisions of the Supreme Court of Wisconsin, plaintiff holds the navigable waters within the state in trust for the public for purposes of navigation, fishing, hunting, swimming, commerce, enjoyment of scenic beauty, and general recreation, and plaintiff also controls the public's right to take or not to take wildlife, including fish. If, without lawful authority, a group of persons were to challenge the power of the state in these respects and were to employ the threat of force to exact financial tribute from those seeking to fish in navigable waters, it would be intolerable conduct and injunctive relief, preliminary and permanent, would be rapidly forthcoming with a showing of little irreparable harm required.

However, defendants assert that there is lawful authority for their conduct and their threatened conduct. They assert that this authority arises from the inherent sovereignty of the Band, treaties entered into by and between the United States and the Chippewas, and federal statutes which preempt state regulation. If these assertions are correct, it would be intolerable that the

Band be denied any longer its powers over its waters and the fish within them, including its powers to regulate the use of those waters by non-members.

It appears that the resolution of these sharply conflicting assertions of authority will be a matter of some difficulty, involving among other things: (1) determining the meaning of the language of the Northwest Ordinance and the statehood enabling Act of 1846, on the one hand, and of the treaties of 1837, 1842, and 1854, on the other; (2) determining the legal significance of the sequence of those events and others; (3) determining whether the reservation includes for any purposes the navigable waters within it and those which straddle its exterior boundary and, if so, for what purpose or purposes.

With respect to the navigable waters lying wholly within the reservation, plaintiff's chance ultimately to prevail in this lawsuit is not yet shown to be sufficiently good that preliminary injunctive relief should be granted in the absence of a rather strong showing of irreparable harm. No such showing has been made on this record. It appears that the harm to those who desire to fish in the disputed waters can be protected by requiring the impoundment of the license fees collected by the Band, together with adequate record keeping. There is virtually no showing in this record that the conduct of the defendants will deter significant numbers of people from traveling to the area for the purpose of fishing.

But with respect to waters, navigable or otherwise, lying beyond the exterior boundary of the reservation, I find no assertion as yet made by the defendants that they

enjoy lawful powers to regulate fishing. They observe that the plaintiff contends "that certain waters generally regarded to be within the Lac Courte Oreilles reservation are in fact not a part of the reservation," that this contention is unproven, and that the plaintiff should be content to seek a declaratory judgment defining what waters are within and without the reservation. Although I agree that the plaintiff's factual showing on this point is unimpressive, if, as I presently believe it to be true, large portions of three lakes are beyond the reservation's exterior boundary, relief more pointed than an eventual declaratory judgment is in order, even though the threatened harm has not been shown to be clearly irreparable or particularly severe.

For the reasons stated in this opinion, the preliminary injunctive order was entered July 9, 1976.

Entered this 12th day of July, 1976.

BY THE COURT:
/s/ James E. Doyle
District Judge

APPENDIX D

STATE OF WISCONSIN,

Plaintiff,

vs.

Odric BAKER, Individually and as Chairman, Lac Courte Oreilles Tribal Governing Board, Pete Larson, Individually and as Vice Chairman, Lac Courte Oreilles Tribal Governing Board, Margaret Diamond, Individually and as Secretary-Treasurer, Lac Courte Oreilles Tribal Governing Board, Charles Diamond, Individually and as a member, Lac Courte Oreilles Tribal Governing Board, Theresa Williams, Individually and as a member, Lac Courte Oreilles Tribal Governing Board, Rick St. Germaine, Individually and as a member, Lac Courte Oreilles Tribal Governing Board, and their agents, employees, and subordinates,

Defendants.

No. 76-C-359.

United States District Court,
W. D. Wisconsin.

Sept. 20, 1978.

OPINION AND ORDER

JAMES E. DOYLE, District Judge.

This is a civil action for declaratory relief brought by the State of Wisconsin against officers and members of the Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians.

It was commenced in the Circuit Court for Sawyer County, Wisconsin. Defendants have removed the action to this court, asserting in the petition for removal that the

"requested relief constitutes an invasion of the area wherein the District Courts of the United States 'have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States' (28 U. S. C. § 1441[b])." The petition goes on to cite various treaties, acts of Congress, tribal laws, and federal executive laws under which "the claim and rights of the defendants" assertedly arise. The test for removal is not the nature of the defendants' claim, but the plaintiff's. However, the claim or right asserted by plaintiff State, purportedly as a trustee for the public, arises under acts of Congress, federal executive action, and treaties. No doubt for this reason, the removal has not been challenged. Unless jurisdiction is absent for reasons discussed below, it is present under 28 U. S. C. § 1331.

Plaintiff alleges: the tribal constitution authorizes the governing board to adopt ordinances generally, and specifically to regulate hunting, fishing, ricing, trapping and boating by members and nonmembers within the reservation; pursuant to that authority defendants have promulgated a tribal conservation code and a tribal court code, have stated that they intend to enforce the codes, and have agents enforcing the conservation code; title to the navigable lakes upon which defendants have stated their intention to enforce the code is in the State of Wisconsin and held in trust for all the public for fishing, navigation and recreation; defendants' enactment and enforcement of the conservation code infringes upon the state's title and duty to regulate the fishery resources of the state for the benefit of the public; and every defendant acted in excess of his or her authority as a member of the governing board by enacting and enforcing the codes. Plaintiff seeks a

judgment declaring that defendants' promulgation and enforcement of the codes is invalid as it infringes on the right of the public to fish upon the lakes in question.

Defendants have filed an amended motion to dismiss plaintiff's complaint, citing these grounds: (1) there is no actual controversy between the parties to this action; (2) plaintiff has failed to join indispensable parties; (3) the sovereign immunity of the Lac Courte Oreilles Band bars this action; and (4) the legislative immunity of the individual defendants bars this action.[1] It is to this motion that this opinion and order are directed.

CASE OR CONTROVERSY

Defendants argue first that the naming of individual members of the governing board as defendants is an attempt to evade the bar of sovereign immunity, but that the attempt must fail because the plaintiff has no controversy with the named individual tribal members. Defendants add that in their individual capacities, they have not acted "in such a way as to invade or prejudicially affect, the rights of the plaintiff." Since the individual defendants have not caused plaintiff any legal injury, they contend, plaintiff has not sufficiently alleged a "case or con-

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[1]The amended motion to dismiss includes a fifth ground: that the complaint fails to state a claim upon which relief can be granted. Apparently in explanation of this ground, defendants' brief asserts legislative immunity. Thus, the fifth ground coincides with the fourth.

Although not mentioned in the amended motion to dismiss, the contention is made in defendants' brief that jurisdiction in this court is lacking because jurisdiction was lacking in the state court from which the action was removed. The issue has been briefed by both parties and I will consider it later in this opinion.

troversy" within the meaning of Article III, Section 2 of the United States Constitution.

This contention is difficult to analyze because it is so closely related to defendants' argument that the sovereign immunity of the Band bars the action. In both arguments, defendants seek to place at issue whether defendants were acting in their official or individual capacities.

But in determining whether there is a "case or controversy," the nature of defendants' capacities is not a necessary part of the analysis. The relevant factors to be considered in determining the presence of a case or controversy are whether the defendants have a personal interest in the outcome of the case, and whether they are parties against whom the requested relief can be granted. *Illinois Migrant Council v. Pilliod,* 540 F. 2d 1062, 1067-1069 (7th Cir. 1976), *rehearing en banc* 548 F. 2d 715. As the term "personal" is used in this context, it does not exclude one's interest in performing the functions of governmental employment or office. In *Illinois Migrant Council,* a class of people sued agents of the Immigation and Naturalization Service, challenging the constitutionality of the I.N.S. search policy. The court held that both the agents who executed the policy, and their superiors, had the requisite personal interest in the outcome of the case.

The present case is analogous. Plaintiff alleges that upon defendants' direction, agents of the defendants are enforcing the tribal conservation code, causing real and substantial injury to the plaintiff and those for whom it serves as trustee. Thus, defendants have a personal interest in the outcome of the case. And if relief is granted to plaintiff, the court can order defendants to direct their agents to discontinue enforcement of the code. Accord-

ingly, it appears that plaintiff has sufficiently alleged a "case of controversy" whether it is directed against defendants in their official or individual capacities.

SOVEREIGN IMMUNITY

It is quite clear from the complaint that defendants purported to be acting as members of the Tribal Governing Board in enacting and enforcing the codes at issue. Therefore, defendants contend, plaintiff's complaint actually presents a cause of action against the Band and such an action is barred by sovereign immunity.

Indian tribes are exempt from suit on the basis of traditional sovereign immunity, unless Congress has consented to the suit. *Santa Clara Pueblo v. Martinez,* 436 U. S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); *Puyallup Tribe v. Washington Game Department,* 433 U. S. 165 at 172-173, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977). Plaintiff does not claim that Congress has consented to this suit against the tribe. A tribe may not be sued indirectly by suing its officers. However, tribal immunity does not protect tribal members sued in their individual capacities. *Means v. Wilston,* 522 F. 2d 833 (8th Cir. 1975); *Weeks v. United States,* 406 F. Supp. 1309 (W. D. Okla. 1975); *Seneca Constitutional Rights Organization v. George,* 348 F. Supp. 48 (W. D. N. Y. 1972). Plaintiff relies on the theory that in enacting and enforcing the codes, defendants acted in excess of their authority, and therefore acted in their individual capacities.

In *Larson v. Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), a private corporation which had contracted to buy coal from the War Assets Administration sought an injunction prohibiting the Administrator from selling the coal to a third party

after the Administrator had refused to deliver it to the plaintiff and had contracted for its sale to the third party. In determining whether in effect the suit was a suit against the sovereign, the crucial question was considered to be not the denomination of party defendants, but whether the relief sought was relief against the sovereign; that is, whether the effect of a judgment would be to restrain the government from acting or to compel it to act. *Id.* at 688, 704, 69 S. Ct. 457; *see also Dugan v. Rank,* 372 U. S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963). In the present case, a declaratory judgment that the tribal conservation and court codes are invalid and illegal as applied to the lakes in question would have the practical effect of restraining the Band's program of requiring licenses and enforcing other provisions of the code on those lakes.

However, there are at least two exceptions to the sovereign immunity rule when officers are named as defendants. As explained in *Larson,* these exceptions are invoked when an officer is claimed to have acted beyond his or her statutory powers, or when the statute or order conferring power upon the officer to act is claimed to be unconstitutional. *See Dugan v. Rank, supra* at 621-622, 83 S. Ct. 999; *Gautreaux v. Romney,* 448 F. 2d 731 (7th Cir. 1971); *Scholder v. United States,* 428 F. 2d 1123 (9th Cir. 1970).

In *Larson,* the court found that the Administrator's general power to administer the government sales program included the power to refuse to deliver goods when he thought it necessary to do so, and that the statute conferring the power was not claimed to be unconstitutional. Thus, the court held that sovereign immunity barred the action.

A similar analysis was employed in *Dugan, supra.* Property owners who would be affected by a large federal water project sued to prohibit officials of the United States Reclamation Bureau from taking plaintiffs' claimed water rights. Again the court determined first whether the effect of the judgment would be to restrain actions of the United States. Having answered that question affirmatively, it reviewed the statutory powers of the reclamation bureau officials. The court determined that the officials had acted within their powers, and that the taking of water rights did not amount to an unconstitutional taking of private property without just compensation. Sovereign immunity applied. *See also Scholder, supra.*

In the present case, plaintiff contends that although defendants are members of the governing board of the Band, sovereign immunity is not present because they are acting in excess of authority conferred upon them in that capacity. To test the validity of this contention, it is necessary to examine the factual and legal sources of the Band's authority, if any, to control fishing by non-members in the lakes in question.

In *United States v. Bouchard,* 464 F. Supp. 1316, decided September 20, 1978, I held that title to the beds of navigable waterways within the Bad River Indian Reservation passed from the federal government to the State in 1848, and remains in the State today. For the reasons explained in that opinion, I now hold that the State has title also to the beds of the navigable lakes at issue in this case.[2] I also expressed the opinion in *Bouchard,* however,

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[2]Nothing in the language or history of the 1837 treaty would support a contention that under that treaty, as distinct from the 1842 treaty, the Chippewa reserved exclusive hunting and fishing rights in the lands ceded in 1837, so as to prevent title to the navigable waters from passing to the State when the State came into being.

that even though title to the navigable waterways rests in the State, the federal government probably retained the constitutional power to grant exclusive use of the waterways to Indian tribes. *Bouchard,* footnote 9. Thus, it may be that since 1848 the Lac Courte Oreilles Band has obtained from the federal government the right of exclusive use of the lakes at issue.

The only possible time at which, and the only possible instrument through which, the federal government might have granted to the Band such a right of exclusive use is the treaty of 1854. The treaty of 1854 contains no mention of a grant of exclusive hunting or fishing rights. Therefore, if a grant of any such right of exclusive use is embodied in the 1854 treaty, it can only be because such a right is implied in the provisions for the creation of several Indian reservations, including the Lac Courte Oreilles reservation. It has been held that an Indian tribe for whom a reservation has been created does enjoy the right to regulate fishing by nonmembers in waters which are a part of the reservation. *Quechan Tribe of Indians v. Rowe,* 531 F. 2d 408 (9th Cir. 1976); *Confederated Tribes of Colville Indian Reservation v. State of Washington,* 412 F. Supp. 651 (E. D. Wash. 1976). *See also* House Rep. # 625, Senate Rep. # 1686 on P. L. 86-634 § 2(18 U. S. C. § 1165), 86th Cong., 2nd Sess. (1960).[3]

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[3]There is a serious question, however, whether the tribal courts enjoy jurisdiction in proceedings to enforce the Band's fishing regulations against nonmembers. *Oliphant v. Suquamish Indian Tribe,* 1978, 435 U. S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209. Recently, counsel for the defendants has submitted unverified copies of the Band's court code and conservation code embodying amendments adopted May 12, 1978, apparently in response to *Oliphant,* limiting enforcement measures in the tribal courts to civil remedies.

Although, as I have said, the United States probably retains the constitutional power to grant to Indian tribes exclusive use of navigable waterways even after title to the beds of the waterways have passed to the states upon their admission to the union, there is a question whether it is permissible for the United States to effectuate such a grant by the device of including such navigable waterways within the borders of a newly created reservation. My opinion is that it is permissible for the United States to employ the device of a treaty.

Courts have repeatedly held that lands which are privately held by non-Indians in fee simple can nevertheless be part of an Indian reservation. *Mattz v. Arnett,* 412 U. S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973); *Seymour v. Superintendent of Washington State Penitentiary,* 368 U. S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962); *United States v. Erickson,* 478 F. 2d 684 (8th Cir. 1973); *The City of New Town, N. D. v. United States,* 454 F. 2d 121 (8th Cir. 1972); *Russ v. Wilkins,* 410 F. Supp. 579 (N. D. Calif. 1976). In *Erickson, supra* at 688, the court explained:

> It was originally held that Indian Country ceased to be such whenever Indians lost title to the land. [citations omitted] This view has been laid to rest by the present definition of "Indian Country" which includes all land within an Indian reservation notwithstanding the issuance of any patent. [citations omitted] Therefore, the fact that the 1908 Act removes title to reservation lands from the Indians and places it into the hands of non-Indians does not, by itself, affect the exterior boundaries of the reservation.

Each of the cases cited above involves established reservations, where title to some of the land has been transferred to non-Indians. The courts have held that without some

affirmative indication that the reservation was to be correspondingly diminished, transfer of title to a nonmember was not sufficient to take the land out of the reservation.

In the present case the issue is whether the lakes were made part of the Lac Courte Oreilles reservation at the time it was established rather than whether lakes which were originally a part of a reservation have been removed subsequently. But the cited decisions directed to the latter question provide support for the proposition that the presence of title in the Indians or in the United States is not an element essential to making lands part of a reservation. Such a holding would also be in accordance with the requirement that Indian treaties be construed as the Indians would have understood them. *Choctaw Nation v. Oklahoma,* 397 U. S. 620, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970); *Worcester v. Georgia,* 31 U. S. (6 Pet.) 515, 8 L. Ed. 483 (1832). The Indians did not have an understanding of the white man's theoretical concept of legal title. Rather, they understood the more practical concept of the right to use and occupy, undisturbed by intruders, as the highest form of "ownership" of territory.

I am aware that many of the cases cited above for the principle that the presence of title in the Indians or in the United States is not necessary for lands to be "part of the reservation" rely in part upon the definition of "Indian country" in 18 U. S. C. § 1151 which does not include title as an element. I am also aware that "Indian land," as that expression is used in the heading to § 1165, dealing with trespasses upon that land for the purpose of hunting, fishing or trapping, does refer to land the title to which is in the United States. *See Bouchard, supra.* Section 1165 appears to have been drafted so as to exclude from

its protective provisions land within reservations held in fee by non-Indians. While title in the United States is required for federal criminal prosecution for trespass pursuant to § 1165, the narrower scope of a statute enacted for that limited purpose is not persuasive authority for a broader principle that title in the Indians or in the United States is necessary to inclusion of land as part of a reservation.

Accordingly, I hold that if the parties intended that a grant of the exclusive use of navigable waters was to be effectuated through the creation of the Lac Courte Oreilles reservation contemplated by the 1854 treaty, and if the lakes at issue were actually included in the reservation thus created, the Band would enjoy the authority to impose licensing upon nonmembers as a condition to fishing in those lakes, the defendants would be acting within the scope of this authority, and tribal sovereignty would bar this suit. A determination whether this was the intention of the parties to the 1854 treaty, and whether they carried it out, requires consideration of the history of relations and negotiations between the Band and the United States from the time of the 1837 treaty to the time of the 1873 executive action approving the selection of lands for the reservation, as well as any other circumstances or events which would elucidate the purposes of the parties to those transactions. See *United States v. Top Sky,* 547 F. 2d 486 at 487 (9th Cir. 1976).

That determination goes to the merits of the controversy, as well as to the issue whether sovereign immunity bars the action. The parties have not submitted complete evidence on that issue. Thus, pending an evidentiary hearing, I will defer my decision on whether sovereign immunity bars this action.

ABSENT PARTIES

Defendants contend that in the absence of the United States and the Lac Courte Oreilles Band, this action must be dismissed. Under Rule 19 of the Federal Rules of Civil Procedure, such a contention is to meet with a pragmatic judicial response, applying the tests embodied in that rule. I will engage in such a pragmatic analysis. Thereafter, I will consider, however, whether previous judicial decisions deprive me of discretion and dictate the result in this case.

Rule 19(a) of the Federal Rules of Civil Procedure states that a party shall be joined if:

> ". . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . . ."

The Band's interest in its asserted power to regulate fishing in the lakes and its interest in the fishing fees are clearly interests relating to the subject of this action. As a practical matter, if in the absence of the Band the named defendants are enjoined from requiring nonmembers to obtain fishing licenses, for a fee, the Band's ability to protect its interest will be impaired and impeded.

It is less clear whether the United States has an interest relating to the subject of this action and, if so, what the nature of that interest may be. No expression of the position of the United States has been made to the court. As I have held in *United States v. Bouchard,* title to the beds of these navigable waters is not in the United States, but in the State of Wisconsin. However, the United States controlled the terms upon which Wisconsin was admitted to the union, and it was a party to the treaties of 1837 and

1854. Because of its paramount role in the process of the admission of new states to the union, the United States may have an interest in vindicating the interest of the State, in its purported role as trustee for the public, in access to the navigable lakes in question without interference by the defendants. On the other hand, because it was a party to the treaties of 1837 and 1854 through which the Band claims the right to license nonmembers, because of its special relationship to this particular Band and its reservation, and because of its special relationship to Indians and their reservations generally, the United States may have an interest, in vindicating the power of the Band and the named defendants to require licenses of nonmembers. If the United States does enjoy an interest allied to that of the State or an interest allied to that of the Band or the defendants, then as a practical matter, if in the absence of the United States either the interest of the State or the interest of the Band or the defendants is judicially vindicated, the ability of the United States to protect its interest in this matter will be impaired or impeded. I will assume, without deciding, that the United States does have an interest relating to the subject of this action, within the meaning of Rule 19(a)(2).

Rule 19(b) states:

> If a person as described in [Rule 19(a)] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping

of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Neither the Band nor the United States can be made a party to this action unless its sovereign immunity is to be waived. Thus, I must determine whether in equity or good conscience, the action should proceed without them.

Factor One: to what extent a judgment rendered in the absence of the Band or the United States or both might be prejudicial to the Band or the United States or both or those already parties.

I see no prejudice to those already parties to this case if judgment were rendered favorably or unfavorably to them in the absence of the Band or the United States or both.

With respect to the Band, the extent of the prejudice would be major if a judgment adverse to the named defendants were rendered in the Band's absence. However, in evaluating this first factor enunciated in Rule 19(b), it is proper to consider the ability of an unjoined party to protect its interests by intervention or otherwise. 3A Moore's Federal Practice (1978) § 19.07-2[1], pp. 19-159 through 19-161. I note that the Band is the plaintiff in a closely related case in this court, *Lac Courte Oreilles Band v. Voigt,* 464 F. Supp. 1316, and that in another closely related case in this court, *United States v. Ben Ruby & Sons et al.,* 72-C-366, 464 F. Supp. 1316, the Band has been granted leave to appear as *amicus* and has so appeared. Also, affidavits of record in the present case revealed that the attorney of record for the named defendants in the

present case has represented the Band in various matters, and that the attorney of record for the named defendants is being assisted by the Native American Rights Fund, which has been actively involved in recent years in the representation of the Band in certain matters. Plainly, the Band enjoys an opportunity to protect its interests fully by moving to intervene as a party in the present case. I appreciate that it is not a small matter for a sovereign to waive its immunity. But when the Band is already a participant in one or more other cases presently pending in this court involving the status of the Chippewa in Wisconsin, there is no reasonable basis for dismissing this action because of the absence of the Band and thus frustrating this plaintiff in its effort to obtain a judicial determination of related issues.

With respect to the United States, it is difficult to estimate the extent of the prejudice which might result if in its absence judgment was rendered either that the defendants possess the power, or that they do not possess the power, to compel nonmembers to be licensed in order to fish in the lakes at issue. Whether the United States shares the State's view of this question or that of the defendants and the Band, its interest in the matter will be affected by a judgment in this case only indirectly. The United States has appeared as plaintiff in a criminal prosecution in this court. *United States v. Bouchard,* 464 F. Supp. 1316, in which the question of title to the beds of navigable waters has been litigated. It has appeared as plaintiff in *United States v. Ben Ruby & Sons et al.,* 464 F. Supp. 1316, in which the question of title to Sections 16 within the Lac Courte Oreilles reservation has been litigated. If it considers that one or more of its important

interests are at stake in the present action, it is free to move to intervene. It is not reasonable to dismiss the present action because of the absence of the United States, and thus to frustrate plaintiff in its effort to obtain a judicial determination of related issues.

Factor Two: *the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.*

I see no way in which prejudice to the Band or to the United States, whatever it may be, can be lessened or avoided by such devices.

Factor Three: whether a judgment rendered in the absence of the Band or the United States or both will be adequate.

A judgment in the State's favor against the named defendants may prove inadequate from the State's viewpoint if either the Band or the United States were to attempt to proceed in a manner inconsistent with that judgment. This contingency appears unrealistic, but whatever its degree of realism, by its choice of parties the State appears willing to accept it.

Judgment in the defendants' favor should prove adequate from the defendants' and the Band's viewpoint.

Depending upon whether the United States shares the State's view of the merits or that of the defendants and the Band, a judgment's adequacy or inadequacy for the United States would correspond to its adequacy or inadequacy for the State or for the defendants and the Band.

Factor Four: *whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.*

Perhaps I will be called upon in the course of this lawsuit to determine whether the State may maintain the action, on a trust theory, in behalf of the members of the public generally. For the present purpose, I assume that it may maintain such an action. I am unaware of any remedy available to the State as an alternative to an action of this kind for declaratory or injunctive relief. The sovereign immunity hurdle would present itself whether the action were commenced in a state court or a federal court and, within the federal court system, in whatever district the action might be brought. The State does not enjoy the choice of breaking the Band's conservation code by fishing upon the disputed lakes without a tribal license, then resisting the enforcement proceeding in the tribal courts, and then seeking whatever judicial review may be available elsewhere. Defendants suggest that one or more of the persons in whose interests the State purports to act as trustee is free to follow such a course of violating the code and resisting the enforcement proceedings. I will not presently decide whether such a course of conduct would be efficacious for an individual person, but I do observe that although the defendants' enforcement of the Band's conservation code obviously entails significant consequences for many nonmembers over the years, it is unlikely that each such nonmember will be prepared to engage in costly and lengthy litigation to challenge the license and license fee requirement.

For the reasons stated, if I enjoy discretion under Rule 19 to decide whether this action should proceed among the parties before the court, I would decide that it should proceed. However, it is suggested that controlling judicial precedent requires me to dismiss this action.

In *Minnesota v. United States,* 305 U. S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939), the state commenced a condemnation proceeding in a state court to take a highway right of way over nine allotted parcels of land which formed part of an Indian reservation. The parcels had been allotted in severalty to individual Indians by trust patents. The condemnation petition named the United States as a party defendant, alleging that the United States held the fee in trust. The action was removed by stipulation to a United States district court. The United States appeared specially and moved to dismiss the action, asserting that it had not consented to the suit and that the state court had enjoyed no jurisdiction over the United States or over the action. The district court denied the motion on the ground that the United States was "not a necessary party" (384, 59 S. Ct. 292) because it had consented to the condemnation proceeding against the Indian allottees. On appeal, the court of appeals reversed, deciding that consent had not been given by the United States and that the district court lacked jurisdiction. Certiorari was granted, and the Supreme Court affirmed the judgment of the court of appeals. The Supreme Court decided that Congress had not authorized the suit. In the absence of such authorization (386-387, 59 S. Ct. 294):

> The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. [Citations omitted] It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way can-

> not be condemned without making it a party. [Footnote omitted] The exemption of the United States from being sued without its consent extends to a suit by a state. [Citations omitted] Hence Minnesota cannot maintain this suit against the United States unless authorized by some act of Congress.

Minnesota v. United States illustrates the peculiar relationship between the doctrine of sovereign immunity and the doctrine of so-called indispensability of a party. See 7 Wright and Miller, Federal Practice and Procedure: Civil § 1617, pp. 172-179. The language of the Court in *Minnesota v. United States* is so cryptic as to suggest that in the absence of a sovereign with an interest in the subject matter, at least when the particular sovereign is the United States, an action simply must be dismissed without regard to pragmatic considerations.[4] One can see that if the feeholder of land cannot be joined as a party, whether because of sovereign immunity or some other reason, it would be impractical to permit a condemnation action by the state to proceed in its absence against other parties in interest. I conclude that this latter is the meaning of *Minnesota v. United States;* that unexpressed pragmatic considerations underlay the decision that the condemnation proceeding should not continue in the absence of the feeholder; and that the sovereignty of the absent feeholder was not the compelling factor. I am re-enforced in this view by the fact that in

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[4] *Minnesota v. United States* was argued in the Supreme Court November 10, 1938, and decided January 3, 1939. The Federal Rules of Civil Procedure became effective September 16, 1938. Rule 19 was anticipated to some extent by former Equity Rules 37, 39, and 42. No reference to any of these rules appears in the opinion of the Supreme Court. (Rule 19 was completely rewritten in 1966.)

cases in which the United States has an interest in the subject matter and has not waived its immunity, the principles embodied in the present version of Rule 19 have been invoked with the result that some actions have been permitted to proceed in its absence and some have not. See 7 Wright and Miller, *supra*, § 1617, at p. 171.

The kinds of cases in which it has been held that the action should not proceed in the absence of the United States include condemnation proceedings (*Minnesota v. United States, supra,* (United States the feeholder)) and actions to quiet title (*Fontenelle v. Omaha Tribe of Nebraska,* 430 F. 2d 143 (8th Cir. 1970) (United States "an indispensable party," where lands held by United States as trustee for Indians, but immunity waived by Congress in the circumstances); *Carlson v. Tulalip Tribes of Washington,* 510 F. 2d 1337 (9th Cir. 1975) (location of boundary between plaintiffs' lands and lands to which United States holds title)). But in the present case, the State, not the United States, holds title to the beds of the navigable waters, and the United States appears not to have any interest in the subject matter except in the possible, and indirect, manner already discussed.

Therefore, I conclude that I am free to exercise the discretion contemplated by Rule 19 and I exercise it to decide that the action may proceed in the absence of the United States and the Band.

LEGISLATIVE IMMUNITY

Defendants contend that they are immune from suit because the acts complained of are legislative acts, protected by the common law doctrine of legislative immunity. Plaintiff responds that the action does not attack

defendants' legislative powers, but only their executive powers.

The relief plaintiff requests is a "judgment declaring the actions of the defendants and the promulgation and enforcement of the Conservation and Court Codes of the Tribe to be illegal and invalid insofar as they infringe [on rights plaintiff asserts]." Despite the reference to promulgation of the codes, the action is clearly directed toward defendants' enforcement of the codes. The tribal constitution indicates that defendants have executive power to enforce the code, as well as legislative power to enact it. Plaintiff does not seek to compel defendants to change or rescind their votes on the code, but only to end its enforcement.

ACTION WAS IMPROPERLY REMOVED

Defendants contend that the federal court's jurisdiction can arise only derivatively from the state court's jurisdiction; that the state court in which this action was originally filed by plaintiff had no jurisdiction over the case; and that, therefore, this court has no jurisdiction. Defendants contend that the state court had no jurisdiction because the cause of action arose on an Indian reservation, where state court involvement would infringe upon the Indians' right of self-government. See *Fisher v. District Court,* 424 U. S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976); *Williams v. Lee,* 358 U. S. 217, 79 St. Ct. 269, 3 L. Ed. 2d 251 (1959); *Worcester v. Georgia,* 31 U. S. (6 Pet.) 350, 8 L. Ed. 483 (1832). In each of these cases, a crucial factor was that the acts which became the subject of state involvement had taken place on an Indian reservation. As I have pointed out, whether the lakes

on which defendants are enforcing their codes are part of the reservation is the crucial issue on the merits of the case, and an issue on which further evidence is necessary to a decision. Accordingly, I will defer my decision on whether removal was proper in this case.

FURTHER PROCEEDINGS

Two defenses raised by the defendants (the sovereignty of the Band and the absence of jurisdiction in the state trial court) turn upon the issue which is also central to the merits of the case: whether the parties to the 1854 treaty intended that the Band be granted the right to the exclusive use of the lakes in question by the device of including the lakes in the Lac Courte Oreilles reservation, and, if so, whether this intention was carried out.

Although I am reserving a ruling on the defendants' motion to dismiss with respect to the two grounds mentioned in the preceding paragraph, I will require defendants to answer the amended complaint, so as to permit a trial following which the motion to dismiss will be fully decided and, if it were then to be denied, the merits will be decided.

In the order entered below, I will provide an opportunity to the parties to complete the factual record for all purposes.

ORDER

It is hereby ordered:

1. Defendants' amended motion to dismiss is denied insofar as it rests on the ground that no genuine case or controversy exists.

2. Defendants' amended motion to dismiss is denied insofar as it rests on the ground that the legislative immunity of the defendants bars this action.

3. Defendants' amended motion to dismiss is denied insofar as it rests on the ground that plaintiff has failed to join the Band or the United States or both as parties.

4. In all other respects, a ruling is reserved on defendants' amended motion to dismiss.

5. On or before October 17, 1978, defendants are to serve and file an answer to the amended complaint.

6. On December 14, 1978, at 9:00 a.m., a consolidated evidentiary hearing on defendants' amended motion to dismiss and a trial on the merits will be held.

7. Unless written objection is served and filed by any party on or before November 10, 1978, I will find as fact for the purpose of the evidentiary hearing and trial referred to in paragraph 6, above:

(a) All of the facts found in the consolidated opinion and order entered today in *United States v. Bouchard, United States v. Ben Ruby & Sons et al.*, and *Lac Courte Oreilles Band v. Voight.*

(b) The contents of the land selection list for the Lac Courte Oreilles reservation transmitted by the Acting Commissioner of Indian Affairs to the Secretary of the Interior on February 24, 1873, and the Secretary's approval dated March 1, 1873 (Exhibit C to plaintiff's complaint).

(c) The contents of a map of the reservation prepared for and accepted by the United States General Land Office on October 18, 1876 (attachment to defendants' reply brief).

(d) The contents of the Constitution and by-laws of the Lac Courte Oreilles Band (attachment to an affidavit by defendant Baker).

(e) The contents of the most recently amended tribal "Court Code" and tribal "Fishing, Hunting, Trapping and Ricing Code" (submitted to the court by defendants' counsel by letter dated May 19, 1978).

Any such written objection to the making of such findings shall identify precisely the findings objected to, and state explicitly the grounds for such objection.

8. A pretrial conference will be held on November 17, 1978, at 10:00 a.m. At the said conference, counsel and the court will discuss the form and manner of submission of additional evidence which any party may desire to submit. Counsel will be expected at that time to disclose fully their intentions. The court contemplates that such additional evidence will probably be in documentary form, but it also contemplates that the parties may desire to submit the testimony of witnesses, expert or otherwise.

APPENDIX E

STATE OF WISCONSIN,

Plaintiff,

vs.

Odric BAKER, individually and as Chairman, Lac Courte Oreilles Tribal Governing Board; Pete Larson, individually and as Vice Chairman, Lac Courte Oreilles Tribal Governing Board; Margaret Diamond, individually and as Secretary-Treasurer, Lac Courte Oreilles Tribal Governing Board; Charles Diamond, individually and as a member, Lac Courte Oreilles Tribal Governing Board; Theresa Williams, individually and as a member, Lac Courte Oreilles Tribal Governing Board; Rick St. Germaine, individually and as a member, Lac Courte Oreilles Tribal Governing Board; and Their Agents, Employees, and Subordinates,

Defendants.

No. 76-C-359.

United States District Court,

W. D. Wisconsin.

Oct. 23, 1981.

OPINION AND ORDER

JAMES E. DOYLE, District Judge.

Findings of Fact

1. The Lac Courte Oreilles ("LCO") reservation was authorized by Art. 2 of the Treaty of September 30, 1854 ("1854 treaty"), and was described as "a tract of land, equal in extent to three townships."

2. Other portions of the same treaty defined and authorized reservations for other bands by metes and bounds descriptions.

3. Parties to the 1854 treaty included the United States and two groups of Chippewa bands, the Chippewa of Lake Superior and the Chippewa of the Mississippi.

4. The LCO band, of which defendants are members and officers, belongs to the group known as Chippewa of Lake Superior.

5. A group or band of Chippewa identified as the LCO band was represented in the signing of the 1854 treaty and had its principal village in the vicinity of the current LCO reservation.

6. Selections of territory for a reservation were made by United States agents and representatives of the LCO band in 1859 and 1865.

7. Descriptions of the 1859 and 1865 selections were by reference to United States Public Lands Surveys (USPLS) plats of the townships involved. The USPLS surveys embody a rectangular system.

8. A fractional section is a unit of description under the USPLS system, and is a section containing appreciably less than 640 acres, usually as a result of an invasion by a meandered body of water or by other land which cannot properly be disposed of as part of that section.

9. The Indian agents assisting the LCO representatives in their land selections, and probably many of the LCO representatives, understood that selection of all of a fractional section for the reservation would convey to the tribe less than 640 acres of dry land, the specific amount of dry land being the acreage indicated for the particular section on the USPLS plat.

10. On August 2, 1869, United States Agent Colonel John W. Knight was sent a copy of instructions by the

Commissioner of Indian Affairs to be utilized in the selection of a permanent reservation to be in as compact a form as practicable and to contain the full amount of 69,120 acres.

11. On September 30, 1869, Agent Knight stated his actions in obedience to these instructions and described in explicit terms by reference to the USPLS plats and the outboundaries of the reservation recently selected by the "Chiefs in Council" of the LCO band.

12. The reservation boundaries described by Agent Knight in his September 30, 1869, letter intersected navigable meandered lakes, including Lac Courte Oreilles and Grindstone Lake, and encompassed all interior navigable waterways.

13. Indian Agent S. N. Clark was responsible for assisting and supervising the final selection of reservation lands under instructions to him dated December 18, 1872 from the Commissioner of Indian Affairs. Those instructions indicated to Agent Clark that he was to consider the 1859 list of selections, the 1865 list of selections, and the 1869 boundaries reported by Agent Knight. Agent Clark, in addition, was told to obtain the view of the Indians and to conform the reservation to those views as nearly as possible.

14. Agent Clark was instructed to deduct from the reservation approximately 1,500 acres of state swampland, identified specifically by list, and section 16 of each township. Areas not included on the 1873 selection list were not intended to be included in the LCO reservation.

15. The intent of the parties developing the 1873 list was that all elements of the list, including the statements of "Area," be included in the definition of the reservation.

16. The selection list transmitted by Agent Clark on February 17, 1873, was the result of those December 18, 1872, instructions.

17. The LCO reservation was not defined or established in final form until March 1, 1873, at which time the Secretary of Interior approved the land selection list transmitted by Agent Clark.

18. The 1873 list describes the reservation by township, range, section, acreage, and, at times, by quarter and quarter-quarter section and government lot numbers.

19. The 1873 list defines the reservation by reference to the rectangular system of the USPLS.

20. Interpretation of the 1873 list requires reference to original USPLS plats of the townships from which the reservation was selected.

21. Selection of the contents of the 1873 list, and probably earlier lists, was made by consultation of LCO representatives and federal Indian agents; the parties had before them ULPLS plats of the relevant townships during such consultation and selection.

22. After the first selection of reservation territory in 1859, LCO representatives and their agents had selected additional tracts of land equaling approximately 12 sections, or 7,680 acres of land.

23. The Indian agents were instructed, and the agents and LCO representatives intended, that fractional sections

be noted, and tracts of land carefully selected, so that the tribe would have the maximum amount of dry land authorized for the reservation, consisting of about 69,114 acres.

24. The 1873 list defines the contents of the LCO reservation and is the primary document to be construed.

25. Although the reservation was defined and established by the 1873 selection list, the boundaries of the reservation were not marked until 1876.

26. Henry Esperson of LaCrosse, Wisconsin, had been hired to survey allotments on the Bad River and LCO reservations in 1875 and 1876 and was hired additionally in 1876 to survey, run, and mark the "out-boundaries" of the LCO reservation.

27. The instructions and information given and known to Esperson for the 1876 survey of the reservation outboundaries included: the 1873 selection list; the USPLS township plats to which the list is referenced; the field notes of the original township surveys; Esperson's June 23, 1876, contract to survey the outboundaries; the Act of Congress of May 29, 1872, referred to in that contract; and the official United States Land Office surveying instructions, printed in 1871, and entitled "A Manual of Instructions to Regulate the Field Operations of Deputy Surveyors."

28. The contract to survey the outer boundaries of the LCO reservation required Esperson to survey in exact accordance with requirements of the 1871 "printed Manual of Surveying Instructions."

29. Esperson undertook a retracement and not a new resurvey. He identified existing monuments and distances. The official 1871 United States Land Office printed Man-

ual of Instructions did not require Esperson's retracement survey to calculate and return distances across the meandered lakes.

30. Esperson's field notes of his survey of the outboundaries indicate that he dropped a survey line at each meandered lake he encountered; that he usually found existing meander posts at those points; and that he set meander posts at such points when he found no existing posts.

31. Esperson did not return distances across any of the meandered lakes on the boundaries of the reservation; he did return distances for every other portion of his survey, including unmeandered bodies of water.

32. Esperson made no notation that he was excluding from the surveyed reservation the entirety of each meandered lake he encountered in setting the outboundaries. He made no notation that with respect to each meandered lake he encountered, he was including some portion within the surveyed reservation. He made no notation whether he was including within the reservation those interior meandered lakes which he did not encounter.

33. Meandered lakes on the exterior boundaries of the reservation under the Esperson survey included those subsequently known as: Lac Courte Oreilles, Little Lac Courte Oreilles, Grindstone Lake, Spring Lake, Little Round Lake, Squaw Lake, Chief Lake, Pokegama Lake, Cranberry Lake, and James Lake (Plaintiff's Exhibits 10-B and 10-C; Defendants' Exhibit 61). Meandered lakes within the "outboundaries" under the Esperson survey included Blueberry, Devil's, Ashegon, Gurno, Indian, Christner, Scott, Two Boys, and Moonshine Lakes, and

portions of the Chippewa River which had also been meandered as a lake.

34. The LCO band controlled all access to Blueberry, Indian, Gurno, Christner, Scott, Two Boys, and Moonshine Lakes when the reservation was established, by virtue of ownership of all surrounding land. The band did not control all access to lakes lying on the exterior boundaries of the reservation.

35. On the 1876 official map of the LCO reservation, approved by the Commissioner of Public Lands and based on the field notes prepared by Esperson, appear both a dotted line and a shaded line passing through the section lines contained in Grindstone Lake and Lac Courte Oreilles. The 1876 map also uses an identical shaded line to designate the excluded Section 16 school lands.

36. The Chippewa Flowage, also known as Lake Chippewa, is an artificially enlarged, navigable lake, formed in the 1920's by the impoundment of the waters of the Chippewa River.

37. Of the original 69,120 acres in the reservation, approximately 26,000, or 37%, is presently owned by non-Indians. 17,000 acres, or 24%, is owned by the LCO band, and 26,000 acres, or 39%, is allotted lands owned by individual members of the LCO band.

38. By the process of allotment and sale of tribal land to non-Indian persons, public access now exists to the Chippewa Flowage, Lac Courte Oreilles, Little Lac Courte Oreilles, Grindstone Lake, Spring Lake, Little Round Lake, Squaw Lake, Chief Lake, Pokegama Lake, Cranberry Lake, James Lake, Blueberry Lake, Ashegon

Lake, Indian Lake, Scott Lake, Two Boys Lake, Moonshine Lake, and those portions of the Chippewa River which were meandered as a lake.

39. The official 1911 map of the LCO reservation and the contemporary United States Geological Survey (US GS) map show: (a) the western boundary of the reservation passing through Grindstone Lake and Lac Courte Oreilles; and (2) the interior meandered waterways lying within the outboundaries of the reservation. In these respects, the 1911 map and the contemporary USGS map are identical to the description of the LCO reservation contained in Agent Knight's 1869 letter (see finding 12, above).

40. Traditionally, the Chippewa exploited the fruits of their land and water habitat in an annual cycle which took them from their winter homes north to their summer homes near Lac Courte Oreilles.

41. During the fur trade period in northern Wisconsin (approximately 1700 through 1840), trading posts were established in a number of locations in northern Wisconsin.

42. The most prominent post was located at La Pointe on Madeline Island and subposts were located at Lac Courte Oreilles, Lac du Flambeau, and St. Croix.

43. By the mid-1830's the once abundant large game animals in northern Wisconsin had been substantially depleted.

44. By the mid-1830's the Chippewa bands had become dependent upon their traders for trade goods, including foodstuff and clothing.

45. The Chippewa developed close ties with the traders through intermarriage and reliance upon the traders as representatives of their interests, especially in negotiations with government agents.

46. During the fur trade periods, the Chippewa developed an understanding of the use of money and used money for the purpose of trade goods.

47. The waters in and around the LCO reservation were used by Indian and non-Indian persons as navigation and trade routes during the fur trade period, the treaty period (1837 to 1854), and into the 1870's.

48. By 1854 the fur trade period had all but ended in northern Wisconsin.

49. In 1826 La Pointe, already a trading center, became the focus for government and, later, intensive missionary work among the Chippewa.

50. By 1837 timber cutting was already occurring in Chippewa territory near the present LCO reservation.

51. By 1854, the lumbering and mining industry was well established in the territory ceded in the 1837 and 1842 treaties, although most of the concentration was in the southern regions and along the shores of Lake Superior.

52. Annuity payments in return for the Chippewa land cessions of 1837 and 1842 eventually replaced trade goods in the Chippewa economy.

53. Likewise, the government Indian agents took over many of the political, social and economic functions once performed by fur traders in Chippewa society.

54. Tribal spokesmen at the 1837 treaty negotiations were aware of the potential impact that the sale of their

land would have on their ability to sustain themselves through hunting and fishing activities unless such rights were reserved in the ceded territory.

55. Chippewa at the 1837 treaty negotiations understood the importance of securing the payments for the sale of their land in money and goods as early and for as long as possible.

56. By 1854 the LCO band's primary source of economic support was annuities from the 1837 and 1842 treaties; expansion of the lumber and mining industries in northern Wisconsin provided significant sources of employment for tribal members of many Lake Superior bands after about 1865.

57. By 1854 the Chippewa bands were more dependent upon agriculture and upon the goods and supplies received annually as payment for the 1837 and 1842 land cessions than they were upon hunting and fishing activities.

58. A majority of the Lake Superior Chippewa had undergone substantial cultural change by the time the 1854 treaty was negotiated; such changes included, among others, education, economy and means of subsistence, religion, dress, housing, and the like.

59. By 1854, the Chippewa in northern Wisconsin were considered by their non-Indian neighbors peaceable and civilized.

60. However, as of about 1854, the LCO Chippewa were the most unassimilated and traditional of all the Wisconsin Chippewa.

61. As of about 1854, the area around Lac Courte Oreilles was one of the most remote and underpopulated areas in the State of Wisconsin. Both the lack of non-Indian population and the excess amounts of water in the area made the area a desirable place for the establishment of a permanent Indian homeland from the point of view of the United States, as well as from the point of view of the LCO Indians.

62. In 1854 the LCO band continued their seminomadic traditional culture of hunting and fishing in their traditional hunting grounds.

63. The LCO band did not fish commercially in the waters in and around the present LCO reservation at the time the 1854 treaty was negotiated but did fish for subsistence and home use in the lakes in and around that area.

64. Prior to 1854 the only natural products sold commercially by the LCO band were the furs from game hunted in and around the LCO reservation.

65. Because of the remote location of the proposed LCO reservation and the nomadic habits of the LCO band, there was little effort by the band or the United States in the years immediately following the 1854 treaty to identify precisely the reservation boundaries.

66. The selection of the LCO reservation in 1873 was precipitated by the band's desire to have their permanent home established and to define the boundaries in order to prevent trespass to their land, primarily by loggers coming into the area to cut timber.

67. The Chippewa controlled access to their land and water habitat and by agreement would, from time to time,

permit the use of the habitat by other Indians and later by non-Indians, on conditions imposed by the Chippewa.

68. However, the LCO band, as well as other Lake Superior bands, did not have functioning or effective programs for regulating nontribal members during the nineteenth century.

69. The bands looked to the United States for protection and for law and order functions throughout all relevant time periods as reflected in the special legislation dealing with the protection sought for tribal timber assets, general trade and intercourse, and hunting and fishing on tribal land.

70. The parties to the 1837 and 1842 treaties intended to secure to the Chippewa temporary hunting and fishing rights in common with all citizens.

71. The rights enjoyed by the LCO band in the territory ceded by the 1837 treaty prior to 1854 were rights in common with all persons. The current LCO reservation is within the area ceded by the 1837 treaty.

72. The primary objectives of the United States in the 1837 and 1842 treaties were to acquire title to Chippewa lands in northern Wisconsin, Michigan and Minnesota and to open such lands to settlement and for economic purposes, including lumbering and mining.

73. Pursuant to Article 2 of the 1854 treaty with the Chippewa, the United States set apart reservations "for the use of the Chippewas of Lake Superior," including the LCO band.

74. The primary objective of the United States in the 1854 treaty was to secure title to the remaining Chippewa lands in Minnesota.

75. A secondary objective of the United States was to concentrate the Chippewa in compact locations, for various reasons.

76. Attempts to remove the Chippewa from northern Michigan and northern Wisconsin, together with the government's desire to acquire title to Chippewa mineral lands in Minnesota, precipitated the 1854 treaty.

77. The federal removal policies of the 30's and 40's gave way in the early 50's to a policy of segregation which centered around the establishment of small and isolated permanent Indian homelands.

78. The United States Indian Department and its field agents were responsible for carrying out this policy and for controlling non-Indian access to the reservations.

79. The national government's intent in the 1854 treaty was to concentrate the Chippewa on small reservations and allot the reservation land to individual tribal members, thereby forcing the Chippewa to give up their seminomadic traditional culture, which would result in the rapid acculturation and assimilation of the Chippewa.

80. The primary objective of the Lake Superior Chippewa in the 1854 treaty negotiations was to secure permanent homes at each of the present reservation locations.

81. The Chippewa representatives at the 1854 treaty negotiations understood that they were selling their lands

and thereafter they would be restricted to their respective reservations.

82. The allotment provisions in the 1854 treaty reflect the Chippewa's understanding of individual ownership of land.

83. By 1854 a large number of tribal members, at least at Bad River and Red Cliff, had a clear understanding of the ownership concept of land and the fact that by the 1854 treaty actual title to remaining Chippewa land was being conveyed with no reserved rights; the Chippewa also understood that the various bands were to obtain from the national government permanent home sites which the national government would reserve and that such land would be allotted to individual tribal members rather than being held communally by the entire tribe.

84. In the years since the establishment of the reservation, from time to time, but not currently, the State of Wisconsin has purported to regulate Indians and non-Indians in respect to navigable waters within the LCO reservation.

85. The state has consistently exercised its jurisdiction against tribal members outside the reservation with respect to hunting, fishing and trapping activities, including the sale of furs.[1]

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[1]Findings 1 through 85 represent an amalgam of those findings, proposed by the parties, which I am prepared to make, and do make, on my own evaluation of the record. The proposed findings as submitted by each party were not models of organization, either in terms of historical chronology or subject matter classification, and the process of amalgamation has not

(Continued on next page)

86. When the 1854 treaty was being negotiated and when it was entered into, the Chippewa in general and the LCO band in particular understood the following: The reservation was to include approximately 69,120 acres of dry land which would lie within certain townships, ranges, sections, quarter-sections, quarter-quarter sections, and government lot numbers, to be agreed upon and designated subsequently. Some of the sections so to be designated would be fractional sections. The outer perimeter of the reservation would consist of the outer lines of the particular sections or quarter-sections or quarter-quarter sections which would lie farthest to the north, to the east, to the south, to the west. For example, the northernmost segment of the western boundary of the reservation would coincide with the west line of that particular section, quarter-section, or quarter-quarter section which would lie farthest to the north and to the west of all those to be designated as parts of the reservation; the next northernmost segment of the western boundary of the reservation would coincide with the west line of that particular section, quarter-section, or quarter-quarter section which would lie immediately to the south and also farthest to the west at that latitude, and so on. These outer section-lines, quarter-section lines, and quarter-quarter section

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(Continued from previous page)

achieved a high order of organizational clarity. Also, it is apparent that I have included many findings that give rise to competing inferences. The purpose of this note is to make it explicit that I am aware of the lack of clarity which arises from certain of these findings. I believe that the ambivalence of some of the findings reflects as accurately as possible the ambivalence in the reality as of about 1837 to 1854. For example, as of 1854 the LCO band was in marked transition from one physical, economic and social setting to another.

lines would mark the outer boundary of the reservation whether or not they might intersect a body of water, meandered or unmeandered, navigable or unnavigable. In the event that such a "border section" might prove to be a fractional section, it would be considered a full square for the purpose of defining the reservation boundary. Within the outer boundary of the reservation, so defined, would lie both the dry land and all the waters, meandered and unmeandered, navigable and unnavigable. Exceptions might be agreed to (as it eventuated with respect to the sections 16), but in the absence of such agreement, all that would lie within such outer boundaries would constitute the reservation. The total acreage lying within the outer boundary of the reservation so defined would certainly exceed 69,120, but it would not exceed about 69,120 acres of dry land.

87. The nature of the outer boundary of the reservation reflected in the 1873 selection list and the result of the Esperson survey were consistent with the outer boundary of the prospective reservation as it had been contemplated by the Chippewa in general and the LCO band in particular at the time they entered into the 1854 treaty, and as described in finding 86, above.

88. When the 1854 treaty was being negotiated and when it was entered into, the Chippewa in general and the LCO band in particular understood that all of the waters, meandered and unmeandered, navigable and unnavigable, which would lie within the outer boundary of the reservation, as defined in finding 86, above, would be waters the use of which it would be within the sovereign power of the Chippewa to control and regulate as to both members and nonmembers of the tribe.

OPINION

The central issue in this case is an issue which has been addressed frequently in one form or another by the national courts of the United States, including the Supreme Court of the United States, and also by the state courts. It is an issue which reflects vividly two powerful themes in the history of the geographical area now controlled by the government of the United States.

The first is the history of the first European settlers: the colonies they formed; the gaining of their independence from Great Britain; the caution with which those colonies then proceeded to federation and union; the importance they continued to place upon their respective sovereignties (specifically, in the present context, the sovereignty of each former colony, now a state, over the navigable waters within its boundaries); and the inevitably emerging doctrine that as the first thirteen states should be united with new sisters, each of the latter should enter that union on "equal fooing" (enjoying the same sovereignty over the navigable waters within its boundaries).

The second theme is the history of the relentless physical displacement of Native Americans by the immigrants; the formal acknowledgement by the immigrants' national government of the sovereignty of the native communities which had so long preceded the immigration; and the failure of the immigrants to honor in practice that formally acknowledged sovereignty of the native communities.

United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926) symbolizes the first of these themes, with its preoccupation with the relationship between the national government and the governments of

the states in the federal system devised by the immigrants, as it bore upon state sovereignty over navigable waters. *Choctaw Nation v. Oklahoma*, 397 U. S. 620, 631, 90 S. Ct. 1328, 1334, 25 L. Ed. 2d 615 (1970), *rehearing denied*, 398 U. S. 945, 90 S. Ct. 1834, 26 L. Ed. 2d 285 (1970), symbolizes one of the happier variations on the second theme, with its sensitivity to the setting in which treaties between the United States and Indian tribes were formed, and the need to interpret those treaties as the Indians would have understood them.

The themes of *Holt* and *Choctaw Nation* have now been dealt with in *State of Montana et al. v. United States et al.*, 450 U. S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The latter decision compels the conclusions: that this court enjoys jurisdiction over the subject matter of this lawsuit, as did the Circuit Court for Sawyer County, Wisconsin, in which it was commenced; that the State of Wisconsin enjoys exclusive sovereignty over the navigable waters lying within the outer boundary of the LCO reservation as defined in finding 86, above, with respect to the use of those waters by non-members of the LCO band and Chippewa tribe; and that the defendants and the LCO band lack power to regulate the use of those waters by such non-members.

I appreciate that the issue in part II of *Montana, supra*, 450 U. S. at 550-58, 101 S. Ct. at 1250-54, was framed in terms of title to the bed of the river, while in the present case, defendants contend that, even if title to the beds of the navigable waters is in the state, as I have earlier determined and now reaffirm that it is, the LCO band was nevertheless granted exclusive power by the 1854 treaty to control the use of these navigable waters by both mem-

bers and non-members. However, I think it clear that in *Montana*, the Court intended to, and did, address the central issue more boldly and sweepingly. Particularly in the face of the concurring opinion by Justice Stevens, *id.* at 567, 101 S. Ct. at 1258, and the dissent, *id.* at 569, 101 S. Ct. at 1260, I view *Montana* as a strong holding that however the Indians may have understood a treaty at the time, the presumption that the United States has not conveyed to an Indian tribe or band sovereignty over the navigable waters within a reservation is so powerful that it may be overcome only: (a) by the most definite and plain language of a particular treaty; or, perhaps, (b) by the existence of exigent circumstances and pressing need, as of the time of the treaty, requiring that the Indians possess such sovereignty over the navigable waters.

The treaty of 1854 with the Chippewa clearly fails to meet test (a).

I have no confidence in the proposition that test (b) stands as an independent test in the wake of *Montana*. I will assume that it does, however, at least when, as here, the treaty itself neither clearly grants to, nor clearly withholds from, the Indians sovereignty over the navigable waters within a reservation.

If I felt free to engage in fact-finding in the form of characterizing the circumstances and need of the Chippewa in general and the LCO tribe in particular, as embodied in findings 1 through 85, above, I would enter the following additional finding:

> 89. The understanding on the part of the Chippewa in general and the LCO band in particular described in findings 86 and 88, above, was a reflection of actually existing exigent circumstances and press-

> ing need on the part of the Chippewa for exclusive control of the resources to be drawn from both the land and the water within the reservation in the long years ahead, as, foreseeably, the lands and waters beyond the boundaries of the reservation were to be exploited in the course of the non-Indian migration to the northern middle west.

Should this decision become the subject of appellate review, I state explicitly that I do now make the foregoing finding number 89, but that I consider it inoperative.

I consider it inoperative because the opinion of the Court in *Montana* implies rather pointedly that the characterization of circumstances as exigent and a need as pressing is to be viewed, at least in this context, as a conclusion of law or perhaps a mixed conclusion of law and fact. In any event, in *Montana* the Court compared the circumstances surrounding the making of the treaties in question in *Choctaw, supra,* and *Montana,* and declared that: "Neither the special historical origins of the Choctaw and Cherokee treaties [in question in *Choctaw supra*] nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868 [in question in *Montana, supra*]." 450 U. S. at 551-555 n.5, 101 S. Ct. at 1251-53 n. 5.

It is clear that the special historical origins of the 1854 Chippewa treaty and its crucial provisions resemble much more closely those of the Crow treaties in question in *Montana, supra* than those of the Choctaw and Cherokee treaties in question in *Choctaw, supra.* Therefore, I conclude that *Montana* precludes a finding of fact or conclusion of law that the circumstances and need of the Chip-

pewa, reflected in findings 1 through 85, above, were sufficiently exigent and pressing to overcome the presumption that in the 1854 treaty the United States did not convey to the Indians sovereignty over the navigable waters within the boundaries of the LCO reservation as defined in finding 86, above[2]

In an order entered in this case on September 20, 1978, 464 F. Supp. 1377, I observed that two defenses raised by the defendants by motion (the sovereignty of the LCO band and the absence of jurisdiction in the Circuit Court for Sawyer County) "turned upon the issue which is also central to the merits of the case: whether the parties to the 1854 treaty intended that the Band be granted the right to the exclusive use of the lakes in question by the device of including the lakes in the Lac Courte Oreilles reservation, and, if so, whether this intention was carried out." I required defendants to proceed to answer the complaint "so as to permit a trial following which the motion to dismiss will be fully decided and, if it were then to be denied, the merits will be decided." I definitely considered that the proceedings held on December 14 and 15, 1978, constituted the trial of this entire action on its merits as well as an evidentiary hearing on the two grounds, described above, for the motion to dismiss.

It was somewhat surprising, therefore, to note that in recent briefing the proceedings on December 14 and 15,

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[2]To avoid uncertainty, perhaps it should be made explicit that in findings 1 through 88, above, while I intend an overall finding that the LCO reservation included the navigable waters, I do not intend a finding or conclusion that title to the beds of those waters was conveyed to the Indians by the 1854 treaty, or that sovereignty over the use of those waters (as distinct from title to their beds) was conveyed to the Indians.

1978, have been described on occasion as an evidentiary hearing on two issues posed by the court. The immediate significance of all this is the defendants' apparent assumption that if the case is not decided in their favor by this court on the present record, they are to enjoy the opportunity to present further evidence bearing on the question whether fishing, hunting and ricing by non-Indians within the LCO reservation threatens and has an adverse effect on the political integrity, economic security, health, and welfare of the LCO band (the so-called inherent sovereignty theory). Although plaintiff expresses a willingness that this court engage in a new and fresh consideration of this newly asserted defense, I am unwilling to do so. However, lest my views on the apparent merits of the newly asserted defense remain wholly a mystery, I make the following comment.

It is not clear whether the additional evidence which defendants may desire to present on the inherent sovereignty issue would be directed to 1981 or to 1854. I would not entertain evidence as to 1981. It is inconceivable that the exclusive power to regulate non-members' use of the navigable waters in the LCO reservation might have resided in the State of Wisconsin in 1848, 1854 and 1876, but that at some time since, that exclusive power shifted to the LCO band by virtue of changes in circumstances which caused the State's possession of that power to pose too severe a threat to the sovereignty of the LCO band. Such a theory would leave the *situs* of power a continuously open question, subject, presumably, to judicial inquiry and determination of the factual circumstances developing from year to year and from decade to decade. Therefore, any such evidence would be limited to the circumstances and needs of the LCO band as of about 1837-1854. Defendants

have had abundant opportunity to present their evidence on that subject for that period.

ORDER

1. It is ordered that defendants' amended motion to dismiss is denied. Jurisdiction is present. 28 U. S. C. § 1331.

2. It is ordered that judgment be entered declaring that: There resides in the State of Wisconsin exclusive jurisdiction to regulate hunting and fishing activities by non-members of the Lac Courte Oreilles Band on and in the navigable waters lying within the outer boundaries of the Lac Courte Oreilles Reservation, as those boundaries are defined in finding 86, above, in this opinion and order. Defendants enjoy no jurisdiction to regulate hunting and fishing activities by such non-members on and in such navigable waters.

3. It is ordered that judgment be entered enjoining defendants, their successors in office, their agents and employees from enforcing or attempting to enforce against any non-members of the Lac Courte Oreilles Band on any navigable water lying within the outer boundaries of the Lac Courte Oreilles Reservation, as defined in finding 86, above, in this opinion and order, the provisions of Section VIII of the Fishing, Hunting, Trapping, and Ricing Code of the Lac Courte Oreilles Band, which was implemented on or about May 24, 1976.

APPENDIX F

TREATY WITH THE CHIPPEWAS.
Sept. 30, 1854.

FRANKLIN PIERCE,
President of the United States of America:

To All and Singular to Whom These Presents Shall Come, Greeting:

WHEREAS a treaty was made and concluded at La Pointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hundred and fifty-four, by Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and headmen, which treaty is in the words following, to wit:—

Articles of a treaty made and concluded at La Pointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and headmen.

Article 1. The Chippewas of Lake Superior hereby cede to the United States, all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary line, to wit: Beginning at a point, where the east branch of Snake River crosses the southern boundary line of the Chippewa country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

The Chippewas of the Mississippi hereby assent and agree to the foregoing cession and, consent that the whole amount of the consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary line.

Article 2. The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:—

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan: Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay.

2d. For the La Pointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north

to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond Du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary line heretofore described, thence north along said boundary line to the mouth of Savannah River, thence down the St. Louis River, to the place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof, large enough to equal such deficiency.

5th. For the Grand Portage band, a tract of land bounded as follows: Beginning at a rock, a little east of the eastern extremity of Grand Portgage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting-point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may each select on or near the lake shore, four sections of land, under the

direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

7th. Each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Article 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be nec-

essary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Article 4. In consideration of and payment for the country hereby ceded, the United States agree to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to wit: five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools and building materials, and three thousand dollars for moral and educational purposes, of which last sum, three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of six thousand dollars, in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment, among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready-made clothing, to be distributed among the young men of the nation, at the next annuity payment.

Article 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much

longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employees to which the Chippewas of Lake Superior may be entitled under previous existing treaties.

Article 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for depredations committed by them shall be made by them in such manner as the President may direct.

Article 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians, and the sale of the same shall be prohibited in the territory hereby ceded, until otherwise ordered by the President.

Article 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi, that the former shall be entitled to two thirds, and the latter to one third, of all benefits to be derived from former treaties existing prior to the year 1847.

Article 9. The United States agree that an examination shall be made, and all sums that may be found equitably due to the Indians, for arrearages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

Article 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed to the amount of one quarter section each.

Article 11. All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

Article 12. In consideration of the poverty of the Bois Forte Indians who are parties to this treaty, they having never received any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benefit. The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of ten thousand dollars, in five equal annual payments, in blankets, cloth, nets, guns, ammunition, and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter, under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smith-shop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood, that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall

hereafter be known as the Chippewas of Lake Superior. Provided, that the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west of the boundary line, shall not apply to the Bois Forte band who are parties to this treaty.

Article 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Henry C. Gilbert, and the said David B. Herriman, commissioners as aforesaid, and the undersigned chiefs and headmen of the Chippewas of Lake Superior and the Mississippi, have hereunto set their hands and seals, at the place aforesaid, this thirtieth day of September, one thousand eight hundred and fifty-four.

HENRY C. GILBERT,
DAVID B. HERRIMAN,
Commissioners.

RICHARD M. SMITH,
Secretary.

La Pointe Band.

KE-CHE-WAISH-KE, or the Buffalo, 1st chief, his x mark. [L. S.]
CHAY-CHE-QUE-OII, 2d chief, his x mark. [L. S.]
A-DAW-WE-GE-ZHICK, or Each Side of the sky, 2d chief his x mark. [L. S.]
O-SKE-NAW-WAY, or the Youth 2d chief, his x mark. [L. S.]
MAW-CAW-DAY-PE-NAY-SE, or the Black Bird, 2d chief, his x mark. [L. S.]
NAW-WAW-NAW-QUOT, headman, his x mark. [L. S.]
KE-WAIN-ZEENCE, headman, his x mark. [L. S.]
WAW-BAW-NE-ME-KE, or the White Thunder, 2d chief, his x mark. [L. S.]

PAY-BAW-ME-SAY, or the Soarer, 2d chief — his x mark. [L. S.]
NAW-WAW-GE-WAW-NOSE, or the Little Current, 2d chief, — his x mark. [L. S.]
MAW-CAW-DAY-WAW-QUOT, or the Black Cloud, 2d chief, — his x mark. [L. S.]
ME-SHE-NAW-WAY, or the Disciple, 2d chief, — his x mark. [L. S.]
KEY-ME-WAW-NAW-UM, headman, — his x mark. [L. S.]
SHE-GOG, headman, — his x mark. [L. S.]

Ontonagon Band.

O-CUN-DE-CUN, or the Buoy 1st chief, — his x mark. [L. S.]
WAW-SAY-GE-ZHICK, or the Clear Sky, 2d chief, — his x mark. [L. S.]
KEESH-KE-TAW-WUG, headman, — his x mark. [L. S.]

L'Anse Band.

DAVID KING, 1st chief, — his x mark. [L. S.]
JOHN SOUTHWIND, headman, — his x mark. [L. S.]
PETER MARKSMAN, headman, — his x mark. [L. S.]
NA-TAW-ME-GE-ZHICK, or the First Sky, 2d chief, — his x mark. [L. S.]
AW-SE-NEECE, headman, — his x mark. [L. S.]

Vieux De Sert Band.

MAY-DWAY-AW-SHE, 1st chief, — his x mark. [L. S.]
POSH-QUAY-GIN, or the Leather, 2d chief, — his x mark. [L. S.]

Grand Portage Band.

SHAW-GAW-NAW-SHEENCE, or the Little Englishman, 1st chief, — his x mark. [L. S.]
MAY-MOSH-CAW-WOSH, headman, — his x mark. [L. S.]
AW-DE-KONSE, or the Little Reindeer, 2d chief, — his x mark. [L. S.]
WAY-WE-GE-WAM, headman, — his x mark. [L. S.]

Fond Du Lac Band.

SHING-GOOPE, or the Balsom, 1st chief, his x mark. [L. S.]
MAWN-GO-SIT, or the Loon's Foot, 2d chief his x mark. [L. S.]
MAY-QUAW-ME-WE-GE-ZHICK, headman, his x mark. [L. S.]
KEESH-KAWK, headman, his x mark. [L. S.]
CAW-TAW-WAW-BE-DAY, headman, his x mark. [L. S.]
O-SAW-GEE, headman, his x mark. [L. S.]
KE-CHE-AW-KE-WAIN-ZE, headman, his x mark. [L. S.]
NAW-GAW-NUB, or the Foremost Sitter, 2d chief, his x mark. [L. S.]
AIN-NE-MAW-SUNG, 2d chief, his x mark. [L. S.]
NAW-AW-BUN-WAY, headman, his x mark. [L. S.]
WAIN-GE-MAW-TUB, headman, his x mark. [L. S.]
AW-KE-WAIN-ZEENCE, headman his x mark. [L. S.]
SHAY-WAY-BE-NAY-SE, headman, his x mark. [L. S.]
PAW-PE-OH, headman, his x mark. [L. S.]

Lac Court Oreille Band.

AW-KE-WAIN-ZE, or the Old Man. 1st chief, his x mark. [L. S.]
KEY-NO-ZHANCE, or the Little Jack Fish, 1st chief, his x mark. [L. S.]
KEY-CHE-PE-NAY-SE, or the Big Bird, 2d chief, his x mark. [L. S.]
KE-CHE-WAW-BE-SHAY-SHE, or the Big Martin, 2d chief, his x mark. [L. S.]
WAW-BE-SHAY-SHEENCE, headman, his x mark. [L. S.]
QUAY-QUAY-CUB, headman, his x mark. [L. S.]
SHAW-WAW-NO-ME-TAY, headman, his x mark. [L. S.]
NAY-NAW-ONG-GAY-BE, or the Dressing Bird, 1st chief, his x mark. [L. S.]

O-ZHAW-WAW-SCO-GE-ZHICK, or the Blue Sky, 2d chief — his x mark. [L. S.]
I-YAW-BANSE, or the Little Buck, 2d chief, — his x mark. [L. S.]
KE-CHE-E-NIN-NE, headman — his x mark. [L. S.]
HAW-DAW-GAW-ME, headman, — his x mark. [L. S.]
WAY-ME-TE-GO-SHE, headman, — his x mark. [L. S.]
PAY-ME-GE-WUNG, headman, — his x mark. [L. S.]

Lac Du Flambeau Band.

AW-MO-SE, or the Wasp, 1st chief, — his x mark. [L. S.]
KE-NISH-TE-NO, 2d chief, — his x mark. [L. S.]
ME-GEE-SEE, or the Eagle, 2d chief, — his x mark. [L. S.]
KAY-KAY-CO-GWAW-NAY-AW-SHE, headman, — his x mark. [L. S.]
O-CHE-CHOG, headman, — his x mark. [L. S.]
NAY-SHE-KAY-GWAW-NAY-BE, headman, — his x mark. [L. S.]
O-SCAW-BAY-WIS, or the Waiter, 1st chief, — his x mark. [L. S.]
QUE-WE-ZANCE, or the White Fish, 2d chief, — his x mark. [L. S.]
NE-GIG, or the Otter, 2d chief, — his x mark. [L. S.]
NAY-WAW-CHE-GE-GHICK-MAY-BE, headman, — his x mark. [L. S.]
QUAY-QUAY-KE-CAH, headman, — his x mark. [L. S.]

Bois Forte Band.

KAY-BAISH-CAW-DAW-WAY, or Clear Round the Prairie, 1st chief, — his x mark. [L. S.]
WAY-ZAW-WE-GE-ZHICK-WAY-SKING, headman, — his x mark. [L. S.]
O-SAW-WE-PE-NAY-SHE, headman, — his x mark. [L. S.]

The Mississippi Bands.

QUE-WE-SAN-SE, or Hole in the Day, head chief, — his x mark. [L. S.]

CAW-NAWN-DAW-WAW-WIN-ZO, or the Berry Hunter, 1st chief, his x mark. [L. S.]
WAW-BOW-JIEG, or the White Fisher, 2d chief, his x mark. [L. S.]
OT-TAW-WAW, 2d chief, his x mark. [L. S.]
QUE-WE-ZHAN-CIS, or the Bad Boy, 2d chief, his x mark. [L. S.]
BYE-A-JICK, or the Lone Man, 2d chief, his x mark. [L. S.]
I-YAW-SHAW-WAY-GE-ZHICK, or the Crossing Sky, 2d chief, his x mark. [L. S.]
MAW-CAW-DAY, or the Bear's Heart, 2d chief, his x mark. [L. S.]
KE-WAY,DE-NO-GO-NAY-BE, or the Northern Feather, 2d chief, his x mark. [L. S.]
ME-SQUAW-DACE, headman, his x mark. [L. S.]
NAW-GAW-NE-GAW-BO, headman his x mark. [L. S.]
WAWM-BE-DE-YEA, headman, his x mark. [L. S.]
WAISH-KEY, headman, his x mark. [L. S.]
CAW-WAY-CAW-ME-GE-SKUNG, headman, his x mark. [L. S.]
MY-YAW-GE-WAY-WE-DUNK, or the One who carries the Voice, 2d chief, his x mark. [L. S.]

John F. Godfroy,
Geo. Johnston,
S. A. Marvin,
Louis Codot,
Paul H. Beaulieu,
Henry Blatchford,
Peter Floy,
Enterpreters.

Executed in the presence of

Henry M. Rice,
J. W. Lynde,
G. D. Williams,
B. H. Connor,
E. W. Muldough,
Richard Godfroy,

D. S. Cash,
H. H. McCullough,
E. Smith Lee,
Wm. E. Vantassel,
L. H. Wheeler.

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the tenth day of January, eighteen hundred and fifty-five, ratify the same by a resolution in the words and figures following, to wit:

"*In Executive Session, Senate of the United States,*
January 10, 1855.

"*Resolved,* (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of a treaty made and concluded at La Pointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and headmen, on the 30th day of September, one thousand eight hundred and fifty-four.

"Attest: "ASBURY DICKINS,
"*Secretary.*"

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the tenth of January, eighteen hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of January, one thousand eight hundred and fifty-five.
[L. S.]

FRANKLIN PIERCE.

By the President:

W. L. MARCY, *Secretary of State.*